159 U.S. 623

31

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~384~~ 53

THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

EMMA GRIFFITH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED SEPTEMBER 28, 1891.

(14,863.)

(14,863.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 304.

THE BALTIMORE AND OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

EMMA GRIFFITH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

INDEX.

	Original.	Print.
Assignment of errors	1	1
Caption	1½	2
Transcript from State court	1½	2
Petition	2	2
Precipe for summons	4	3
Summons	4	3
Sheriff's return	5	4
Petition for removal	6	5
Bond for removal	8	6
Order for removal	10	7
Clerk's certificate	10	7
Answer	11	8
Order beginning trial	12	8
Orders continuing trial	13	9
Verdict	14	9
Motion for new trial	14	10
Amendment to motion for new trial	15	10

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 6, 1894.

	Original.	Print.
Affidavit of J. E. Rankin (omitted in printing)	16	—
Charles H. Stimson (" ")	17	—
Certified copy of marriage record (" ")	18	—
Affidavit of Hannah House (" ")	20	—
Henderson Haster (" ")	22	—
Eden Holtsberry (" ")	24	—
Horace H. Rosebraugh (" ")	26	—
Mary L. Springer (" ")	28	—
Jesse L. Roby (" ")	30	—
Melissa A. Lewis (" ")	31	—
Order extending time to prepare and present bill of exceptions	32	11
Judgment, December 2, 1890	33	11
Order allowing bills of exceptions	33	11
Order vacating entries as to rendition of judgment and bills of exceptions	35	12
Opinion of Judge Sage on motion for new trial	36	12
Judgment, December 12, 1890	44	16
Order as to stay, etc	44	16
Exception of plaintiff to judgment	45	17
Order allowing bills of exceptions	46	17
Bill of exceptions No. 1	47	17
Evidence for plaintiff	48	18
Testimony of Mrs. Esther Griffith	48	18
J. W. Etnire	71	31
Admission as to testimony of Mrs. Emma Griffith	73	32
Testimony of John W Spicer	74	32
Solomon Holtzberry	75	33
Matthias Gray	80	36
W. F. Davisson	82	37
John Neal	84	38
Ebenezer Griffith	92	43
Allen Sikes	97	46
Annie Griffith	98	47
Dr. Lecrone	100	48
Dr. Lattimore	103	50
Dr. Lecrone (recalled)	107	51
John Stedman	107	52
Frank Lewis	112	54
Evidence for defendant	117	57
Testimony of W. A. Smith	117	57
John A. Ryan	128	63
Willis R. Stone	143	72
John Blair	149	76
Joseph M. Workman	156	79
Isaiah Van Horn	159	81
J. C. Scott	161	83
David H. Pigg	165	85
C. S. Brady	167	86
Frank P. Gray	169	87
Defendant's requests for instructions	178	92
Charge to the jury	182	93
Motion for new trial	196	101
Judge's certificate to bill of exceptions	196	101

	Original.	Print.
Plat of Locust Grove crossing and its surroundings	197a	101
Map showing vicinity of accident	197b	101
Bill of exceptions No. 2	198	102
Contention of defendant on motion for new trial	198	102
Ruling on motion for new trial	199	102
Judge's certificate to bill of exceptions	199	102
Supersedeas bond	200	103
Clerk's certificate	202	103
Writ of error	203	104
Citation	204	104
Proof of service of citation	205	105
Stipulation to omit affidavits in printing	206	105

1 In the Supreme Court of the United States.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiff in Error,
vs.
EMMA GRIFFITH, Defendant in Error.
} Assignment of Error.

And now comes the plaintiff in error, The Baltimore and Ohio Railroad Company, and here shows to the court that in the record of the proceedings and judgment of the circuit court of the United States for the eastern division of the southern district of Ohio, in a cause lately pending therein wherein Emma Griffith, defendant in error, was plaintiff and this plaintiff in error was defendant, there is manifest error in this, to wit:

First. The said court erred in refusing to give the first charge asked by the plaintiff in error.

Second. The said court erred in refusing to give the second charge asked by the plaintiff in error.

Third. The said court erred in refusing to give the third charged asked by the plaintiff in error.

Fourth. The said court erred in refusing to give the fourth charge asked by the plaintiff in error.

Fifth. The said court erred in refusing to give the fifth charge asked by the plaintiff in error.

Sixth. The said court erred in refusing to give the ninth charge asked by the plaintiff in error.

1¼ Seventh. The court erred in refusing to give the tenth charge asked by the plaintiff in error.

Eighth. The court erred in refusing to give the twelfth charge asked by the plaintiff in error.

Ninth. The court erred in refusing to give the thirteenth charge asked by the plaintiff in error.

Tenth. The court erred in overruling the motion of the plaintiff in error for a new trial.

Eleventh, Upon the whole record judgment should have been rendered in said cause in favor of the plaintiff in error and against the defendant in error instead of the judgment which was rendered.

A duly certified copy of the record of the said circuit court in said cause is herewith filed, together with the writ of error and citation therein.

Plaintiff in error further says that since the rendition of said judgment the said Emma Griffith has intermarried and her name is now Emma Renz.

Whereupon the said plaintiff in error asks that the said judgment of the said circuit court be reversed and held for naught.

J. H. COLLINS,
Attor'ys for Plaintiff in Error.

1½ THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Eastern Division, }

At a stated term of the circuit court of the United States of America within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Columbus, O., in said district, on the first Tuesday of December, being also the second day of that month, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States of America the one hundred and fifteenth—present, the Honorable George R. Sage, district judge—among the proceedings had were the following, to wit:

EMMA GRIFFITH, Plaintiff, }
vs. } At Law.
THE BALTIMORE & OHIO RAILROAD COMPANY, Defendant. }

Be it remembered that heretofore, to wit, on the fourth day of December, in the year of our Lord one thousand eight hundred and eighty-eight, came the defendant, The Baltimore & Ohio Railroad Company, by its attorney, and filed in the clerk's office of said court their certain transcript from the Licking county common pleas court; said transcript is clothed in the words and figures following, to wit:

Transcript.

2 STATE OF OHIO, } ss:
Licking County, }

Court of Common Pleas.

EMMA GRIFFITH, Plaintiff, }
vs. } Petition.
THE BALTIMORE & OHIO RAILROAD COMPANY, Defendants. }

The said Emma Griffith, plaintiff, complains of the said Baltimore and Ohio Railroad Company, defendants, for that the said defendants on the 1st day of August, A. D. 1888, and for many years before and ever since has been a corporation under the laws of the State of Maryland for the operation and management of railroads, and was at said time engaged in controlling and operating their railroad over the Newark, Somerset and Straitsville railroad, and which railroad is known as and is the Straitsville division of the said Baltimore and Ohio Railroad Company, and which is a railroad running from the city of Newark, Ohio, southerly to the village of Straitsville, in the same State.

And said defendants were accustomed and did in fact run and operate their railroad, locomotives, and cars over said railroad in trains carrying passengers and freight and otherwise.

That on said August 1st, 1888, the said plaintiff, together with her mother, Esther Griffith, was going from their home in said Licking county, about five miles south of Locust Grove crossing,

with a buggy and horse drawing the same, driven by said Esther Griffith, along the public highway leading from their said home to the said city of Newark, and which public road crossed the track of said railroad at a place called the Locust Grove crossing, about four miles of Newark; that as the said buggy, with its said passengers, were approaching said crossing about noon of said day, said
3 *of said day, said* defendants were engaged in operating, managing, and running a passenger train at a high and dangerous speed going north on said railroad, and that in operating, managing, & running said train the said defendants, by their agents and servants, so carelessly and negligently operated, managed, and run said train and so carelessly and negligently neglected to sound any signals of its approach to said crossing that by reason of said carelessness, negligence, and improper management the *oocomotives* and cars of said train struck and ran against and over the said horse and buggy as they were being driven by said Esther Griffith across the track of said railroad at said Locust Grove crossing and then and thereby, without any fault on the part of said plaintiff, Emma Griffith, utterly destroyed said horse and buggy and struck and ran against and over the said plaintiff and greatly injured head, brain, back, body, and limbs and greatly injured her internally, making her unconscious for a long — and by reason whereof she became gr-ev*i*ously sick and lame and permanently injured, whereby she has been unab*o*e to attend to her lawful business and has suffered much pain and agony and has been put to great trouble and expense in and about nursing and caring for her and in endeavoring to be healed and cured.

By reason of the premises the said plaintiff has been damaged in the sum of ten thousand dollars.

Wherefore the said plaintiff prays judgment against the said defendants for the said sum of ten thousand dollars, her damages so as aforesaid sustained.

S. M. HUNTER,
Attorney for Plaintiff.

STATE OF OHIO, } ss:
Licking County, }

Before me personally appeared Emma Griffith, who, being first duly sworn, says the matters and things set out in the fore-
4 going petitions are true as she verily *verily* believes.

EMMA GRIFFITH.

Sworn to before me and subscribed in my presence this 10th day of August, A. D. 1888.

E. A. BEVERLY,
Justice of the Peace.

Praecipe.

To the clerk:

Issue summons for the defendants to the sheriff of Licking county, Ohio, returnable according to law; amount claimed, $10,000.

S. M. HUNTER,
Att'y for Pl'ff.

(Endorsed on cover:) No. 5884. 36-392. Emma Griffith *vs.* The Baltimore & Ohio Railroad Company. Petition. Filed Oct. 29, 1888. Thos. F. Lennox, cl'k. Precipe within. Hunter.

Summons.

THE STATE OF OHIO, }
Licking County, } *ss:*

To the sheriff of Licking county:

You are hereby commanded to notify the Baltimore and Ohio Railroad Company that it has been sued by Emma Griffith in the court of common pleas of Licking county, and that unless it answer on or before the 1st day of December, A. D. 1888, the petition of the said plaintiff against it filed in the clerk's office of said county, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on or before the 12th day of November, A. D. 1888.

Witness my hand and the seal of said court, at the city of Newark, this 29th day of October, A. D. 188–.

THOMAS F. LENNOX, *Clerk,*
[SEAL.] By WM. P. YOUNG,
Deputy Clerk.

Plaintiff's Claim.

Amount claimed, $10,000.00.

THOMAS F. LENNOX, *Clerk,*
By WM. P. YOUNG,
Deputy Clerk.

Sheriff's Return.

THE STATE OF OHIO, }
Licking County, } *ss:*

Received this writ Oct. 29, A. D. 1888, at 4 o'clock p. m., and on the 30th day of October, A. D. 1888, I served the same by delivering a true copy thereof, with all the endorsements thereon, personally to A. W. Dennis, the regular freight agent of the within-named railroad company, to wit, the Baltimore and Ohio Railroad Company, who has charge of its freight depot situated in said county, the president or other chief officer of said company having no residence in said county.

A. J. CRILLEY, *Sheriff,*
By WM. SEVIN, *Deputy.*

Fees.

Service & ret	.30
Mileage	.16
Copy	.20
Total	.66

6 THE STATE OF OHIO, }
Licking County. }

Court of Common Pleas.

EMMA GRIFFITH, Plaintiff, }
vs. }
THE BALTIMORE & OHIO R. R. CO., Defendants. }

Petition for Removal.

To the honorable the court of common pleas within and for the county of Licking, in the State of Ohio:

The petition of the Baltimore & Ohio Railroad Company, a corporation of the State of Maryland, shows that your petitioner is the defendant in this suit, and that the same was brought by Emma Griffith, plaintiff, on or about the 29th day of October, 1888, in the court of common pleas of Licking county, in the State of Ohio, and that said plaintiff is and was at the time of the bringing of this suit a citizen of the State of Ohio, and that your petitioner is and was at the time of the bringing of this suit a corporation created under and by the laws of the State of Maryland, and therefore is and was at the time named a citizen of the State of Maryland; and your petitioner further respectfully shows that the said plaintiff claims in the petition and summons in this suit as damages the sum of ten thousand dollars, and that the matter in dispute therefor- exceeds the sum of two thousand dollars, exclusive of costs.

And your petitioner further respectfully shows that this suit is brought by said plaintiff against the said defendant demanding the said sum of ten thousand dollars for damages for alleged personal injuries to her through the alleged negligence of defendant, as set forth in the petition of the plaintiff, which is here referred to.

7 And your petitioner further respectfully represents that this suit has not been tried, but the same is pending for trial in said court of common pleas within and for said county and State, and that your petitioner desires to remove this suit, before the trial thereof, into the circuit court of the United States within and for the southern district of Ohio, eastern division, in pursuance of the provisions of law contained in the act of Congress, approved August 13, 1888, entitled "An act to correct the enrollment of an act approved March 3, 1887, entitled 'An act to amend sections 1, 2, 3, and 10 of an act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts and for other purposes,'" approved March 3, 1875; and that the defendant is ready and willing to give such good and sufficient surety as this court may direct for doing all acts and things required to be done by the said provisions of law upon the removal of a suit into the United States court, and it offers herewith its bond, executed by Charles H. Kibler, Edward Kibler, R. T. Devries, and W. H. Peabody, in the penal sum of $500.00, conditioned according to the provision of law herein referred to.

KIBLER & KIBLER,
Att'ys for Defendant.

THE STATE OF OHIO, }
Licking County. }

Charles H. Kibler, being duly sworn according to law, says that he has read the foregoing petition and knows the contents thereof, and that the same is true, as he verily believes, and that affiant is attorney in the premises of the defendant, which is a foreign corporation.

CHARLES H. KIBLER.

Sworn to before me and subscribed in my presence by said Kibler this 24th day of November, 1888.

WM. P. YOUNG,
Deputy Clerk Com. Pleas Court.

8 THE STATE OF OHIO, }
Licking County. }

Court of Common Pleas.

EMMA GRIFFITH, Plaintiff, }
vs.
THE BALTIMORE AND OHIO RAILROAD CO., Defendant. }

Bond.

We, Charles H. Kibler, Edward Kibler, R. T. Devries, and W. W. Peabody, are held and firmly bound unto Emma Griffith, the plaintiff in this suit, in the sum of five hundred dollars, to be paid to the said Emma Griffith, her executors, administrators, or assigns, for which payment, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators firmly by these presents.

Sealed with out seals and dated this — day of November, 1888.

Whereas a suit was brought on or about the 29th day of October, 1888, in the court of common pleas within and for the county of Licking, in the State of Ohio, by the said Emma Griffith, plaintiff, against the said The Baltimore & Ohio Railroad Co., defendant, and is removable into the circuit court of the United States for the southern district of Ohio, eastern division, under the act of Congress, approved August 13, 1888, entitled "An act to correct the enrollment of an act approved March 3, 1887, entitled 'An act to amend sections 1, 2, 3, and 10 of an act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from the State courts and for other purposes,'" approved March 3, 1875;

And whereas the said The Baltimore and Ohio Railroad Company has filed its petition in said court of common pleas for the re-
9 moval of said suit into the circuit court of the United States for the southern district of Ohio, eastern division:

Now, the consideration of this obligation is such, that if the above named, The Baltimore and Ohio Railroad Company, shall cause to be entered in the circuit court of the United States for the southern district of Ohio, eastern division, on or before the first day

of the next session thereof, after the filing of said petition for removal, a copy of the record in said suit, and shall pay all cost that may be awarded by said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to be and remain in full force and virtue in law.

CHARLES H. KIBLER. [SEAL.]
EDWARD KIBLER. [SEAL.]
R. T. DEVRIES. [SEAL.]
W. W. PEABODY. [SEAL.]

(Endorsed:) No. 5884. 36–392. Common pleas court of Licking Co. Emma Griffith, plaintiff, *vs.* The Baltimore and Ohio Railroad Co., defendants. Petition and bond for removal. Filed Nov. 24, 1888. Thos. F. Lennox, clerk. Kibler & Kibler, J. H. Collins, solicitors for defendant.

10 And afterwards, to wit, at the Sept. term, A. D. 1888, to wit, on the 27 day of Nov., A. D. 1888, the following proceedings were had, to wit:

EMMA GRIFFITH, Plaintiff,
vs.
THE BALTIMORE & OHIO RAILROAD CO., Defendants. } No. 5884.

The said Baltimore and Ohio Railroad Co., defendant, having, before the time the defendant was required to answer to the petition on complaint of said Emma Griffith, pl'ff, filed its petition for removal of this action for that to the circuit court of the United States for the southern district of Ohio, eastern division, and also a bond with good and sufficient sureties for the entering by defendant in said circuit court on the first day of its next term a copy of the record of this suit and for paying all costs that may be awarded by the said circuit court, if that court should hold that this suit was wrongfully and improperly removed thereto, this court now finds that said petition shows a cause for such removal, and that said bond and sureties are sufficient and accepts said petition and bond, and orders said removal and that this court proceed no further in this suit; to which judgment the plaintiff excepts.

THE STATE OF OHIO, }
Licking County, } *ss:*

I, Thos. F. Lennox, clerk of the court of common pleas in and for the county of Licking, in the State of Ohio, and in the 6th judicial district of Ohio, do hereby certify that the above and foregoing are true and correct copies of the process issued against the said The Baltimore and Ohio Railroad Company in the above-entitled
11 cause of Emma Griffith against The Baltimore and Ohio Railroad Co., No. 5884, and of all pleadings, depositions, testimony, and other proceedings in the said cause.

In witness whereof I, the said Thos. F. Lennox, have hereto set my name and the seal of said court at Newark, Ohio, in said county, this 28 day of Nov., A. D. 1888.

THOS. F. LENNOX, *Clerk*, [SEAL.]
By WM. P. YOUNG, *Deputy Clerk*.

And afterwards, to wit, on the 20th day of April, A. D. 1890, the following answer was filed in the clerk's office of said court clothed in the words and figures following, to wit:

Answer:

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

EMMA GRIFFITH, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

Answer.

And now comes the said defendant, The Baltimore and Ohio Railroad Company, and for its answer to the plaintiff's petition herein says:

That admitting that said defendant is a corporation of the State of Maryland, and that said defendant on August 1st, 1888, was engaged in operating and controlling their railroad over the Newark, Somerset and Straitsville railroad, from the city of Newark southerly to the village of Shawnee, upon which said defendant was accustomed to operate its locomotives and cars over said rail-
12 road in trains, and that the buggy in which plaintiff was riding was struck by a train of said defendant and that said plaintiff was somewhat injured, this defendant denies each and every other allegation in the petition of plaintiff contained, and prays judgment.

J. H. COLLINS AND
KIBLER & KIBLER,
Atty's for said Defendant.

THE STATE OF OHIO, }
Licking County, } *ss:*

Jonathan E. Rankin, being first *first* duly sworn according to law, deposes and says that he is the special agent, duly authorized in the premises, for the said defendant, The Baltimore and Ohio Railroad Company, which is a foreign corporation, and that the facts and allegations in the foregoing answer contained are true, as affiant verily believes.

J. E. RANKIN.

Subscribed in my presence and sworn to before me by said Jonathan E. Rankin this 16th day of March, 1889.

J. H. GLOVER, JR.,
Notary Public in and for Licking County, Ohio. [SEAL.]

And afterwards, to wit, on the 6th day of June, A. D. 1890, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal B, p. 238.

This day came the parties, by their attorneys, and thereupon to try the issues joined, a jury being called, came, to wit, Daniel Matheny, Adam Quick, William Poland, William Coywood, Cosmer Lorenz, Thomas Breen, William Kent, Andrew J. Mann,
13 James Cady, John Gates, B. V. Lunn, and Robert Knox, who were duly empaneled and sworn well and truly to try the issues joined between the parties herein, but the testimony not being concluded at the hour of adjournment the court respited the jury until 9.30 o'clock tomorrow morning, to which time this cause is continued.

And afterwards, to wit, on the 7th day of June, A. D. 1890, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal B., p. 238.

This day again came the parties, by their attorneys, and also the jurors heretofore empaneled and sworn herein, but the hour of adjournment having arrived and the testimony not being concluded the court respited the jury until two o'clock Monday afternoon, to which time this cause is continued.

And afterwards, to wit, on the 9th day of June, A. D. 1890, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal B., p. 245.

This day again came the parties, by their attorneys, and also the jurors heretofore empaneled and sworn herein, but the hour of adjournment having arrived and the testimony not being concluded the court respited the jury until ten o'clock tomorrow morning, to which time this cause is continued.

And afterwards, to wit, on the 10th day of June, A. D. 1890, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

14 Journal B, p. 245.

This day again came the parties, by their attorneys, and also the jurors heretofore empaneled and sworn herein, who, having heard the testimony, the arguments of counsel, and the charge of the court, upon their oaths do find the issues joined in favor of the plaintiff and assess her damages at five thousand ($5,000) dollars; whereupon came the counsel for defendant and gave notice of motion for new trial.

And afterwards, to wit, on the 10th day of June, A. D. 1890, the following motion was filed in the clerk's office of said court clothed in the words and figures following, to wit:

Motion for New Trial.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division

EMMA GRIFFITH, Plaintiff,
vs.
THE BALTIMORE & OHIO R. R. Co., Defendant.

Motion for a new trial.

Now comes the defendant, The Baltimore and Ohio Railroad Company, and moves the court to set aside the verdict and grant a new trial in this case for the reasons following:

First. The court erred in refusing to direct a verdict in favor of the defendant.

Second. The verdict is against the weight of testimony and is contrary to law.

Third. The jury disregarded the law as given them in the charge by the court.

15–31 Fourth. A member of the jury, to wit, one John Gates, was guilty of misconduct during the trial of the cause by talking about the case to a reporter of a newspaper.

C. H. KIBLER,
J. H. COLLINS,
Att'ys for Defendant.

And afterwards, to wit, on the 11th day of June, A. D. 1890, the following amended motion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Amendment — Motion for New Trial.

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

EMMA GRIFFITH, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD CO., Defendant.

Amendment to motion for a new trial.

And now comes the defendant and, by way of amendment to its motion for new trial filed in this case on yesterday, adds the following as a ground for new trial, to wit:

Newly discovered evidence. By this newly discovered evidence the defendant expects to prove that the plaintiff was subject to epileptic fits long before the accident complained of in this case, which

evidence was not known to the defendant and could not have been discovered by reasonable diligence, and for this reason the defendant claims that the damages are excessive.

J. H. COLLINS,
Att'y for Def't.

* * * * * * *

32 And afterwards, to wit, on the 1st day of December, A. D. 1890, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal B, p. 255.

Upon the defendant's motion and in accordance with the rule and practice of this court, the time for preparing and presenting its bill of exceptions taken upon the trial is extended to thirty days from and after the last day of the present term of this court.

And afterwards, to wit, on the 2nd day of December, A. D. 1890, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

33 Journal B, p. 268.

This day came the parties, plaintiff and defendant, and this cause came on to be heard upon the motions of the defendant to set aside the verdict and for a new trial and was argued by counsel, and the court, being duly advised in the premises, finds that said motions are not well taken and overrules the same; to which judgment overruling said motions the defendant then and there excepted, and, the counsel for plaintiff praying for judgment on the verdict, it is ordered and adjudged that the plaintiff recover a judgment against the defendant for said sum of five thousand dollars, with interest from the second (2) day of December, 1890. The defendant is adjudged to pay the costs of this action, taxed at $—.

It is ordered that execution be stayed until the ninth day of January, 1891, to enable the defendant to prepare and have allowed and file a bill of exceptions in this cause.

And afterwards, to wit, on the 12th day of December, A. D. 1890, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal B, p. 258.

This day came the defendant, by its counsel, and within the time allowed by the court and extended at the June term thereof for the year 1890 for thirty days after the adjournment of the same, here presents to the court its bill of exceptions taken on the trial of this case at the said June term of said court, which is allowed,
34 signed, and sealed by the court and ordered to be made a part of the record in this case.

And at the same time the said defendant presented to the court

its bill of exceptions No. 2, taken on the hearing of the motion for a new trial herein, and, the same being found to be correct, the same is allowed, signed, and sealed by the court and ordered to be made a part of the record in this case.

35 And afterwards, to wit, on the 12th day of December, A. D. 1890, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal B, p. 268.

It appearing to the court that all entries heretofore entered relating to the rendition of judgment and as to bill of exceptions were inadvertently entered, it is hereby ordered and adjudged that all of said entries are hereby vacated and cancelled.

And afterwards, to wit, on the 12th day of December, A. D. 1890, the following opinion of Judge Geo. R. Sage was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Opinion of Judge Sage.

36 Circuit Court of the United States, Southern District of Ohio, Eastern Division.

EMMA GRIFFITH
vs.
THE B. & O. RAILROAD CO.

On motion for new trial.

SAGE, *J.*:

The first ground upon which a new trial is asked is newly discovered evidence. It appeared upon the trial that the plaintiff has been, since the accident which caused the injury for which she seeks recovery, subject to epileptic fits. The testimony of the physicians on her behalf tended to prove that these were caused by the depression of the inner table of the frontal bone of the skull by concussion at the time of the accident and consequent pressure upon the brain. The defendant now produces affidavits that several persons, naming them, have stated and will testify that the plaintiff was subject to epileptic fits before the time of the accident; but, on the other hand, the plaintiff produces affidavits from each one of the persons named denying having made such statements and denying that the facts existed to which it was said they would testify. This ground for new trial is therefore not sustained.

The next ground is that the court erred in not directing a verdict for the defendant. It is argued in support that the only negligence alleged or sought to be proven against the defendant was the failure to sound the whistle of the locomotive and to ring the bell, and that the proof was all the other way so clearly that the verdict should have been directed as asked.

37 With reference to the sounding of the whistle, several witnesses, including the engineer and fireman, did testify that it was sounded, and, while quite a number of persons testified that they did not hear it, no one testified that it was not sounded.

But some of the witnesses testified positively that the sounding of the whistle was at Hog Run bridge, which, according to the other testimony, is 2,430 feet from the crossing where the accident occurred, and that it continued about five seconds, the train running at the rate of forty miles an hour or fifty-six feet per second. From the whistling post to the crossing the distance is 1,080 feet, so that, according to that testimony, the whistle was not sounded when the train was nearer than 2,150 feet to the crossing. Section 3336 Rev. Stat. of Ohio provides that the engineer or person in charge of the locomotive in motion approaching a road crossing at grade—and such was the crossing where the accident in this case occurred—shall sound the whistle at a distance of at least eighty and not farther than one hundred rods from the place of crossing and ring the bell continuously until the engine passes the crossing. Section 3337 makes the company liable in damages to any person injured in person or property by failure to give the signals as provided in section 3336. Now, as to the ringing of the bell the testimony is conflicting. There were witnesses who testified that the bell was rung, and others who testified that it was not rung, and still others who testified that they did not hear it. The plaintiff and her mother, according to the mother's testimony, were looking and listening for the train as they approached the track. They knew that it was about due and that they were anxious about the crossing.

38 They would therefore have been likely to hear the whistle if sounded or the bell if rung. As to the sounding of the whistle, the jury were charged in accordance with the rule laid down in the text books and in Stitt *vs.* Huidekopers, 17 Wallace, 394, that "ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to a negative may have forgotten. It is not possible to remember a thing that never existed." But, after all, that is only the statement of a rule with reference to the weight of testimony, and it would not authorize a court to determine the fact where the case was being tried to a jury. There was affirmative testimony that the sounding of the whistle was not within the distance required by the Ohio statute, and therefore not the signal required to be given to relieve the company from the charge of negligence; and there was also positive testimony that the bell was not rung as the train approached the crossing. The case was not one, therefore, in which the court could rightly have directed a verdict for the defendant.

The next ground for new trial is that the court erred in charging that the burden of proving contributory negligence was upon the defendant. It is admitted that the charge was in accordance with the general rule in the United States court; but it is urged that this action is one under and by virtue of sections 3336 and 3337 of the Ohio statute. Section 3336 makes every engineer or person in

charge of a locomotive engine moving upon its road who fails to comply with the provisions of section 3336 personally liable to a penalty of not less than $50 or more than $100, and also makes the company liable in damages for such neglect where the injury results therefrom. Counsel for defendant claims that therefore the rule of evidence must be as recognized in the State courts, that to warrant a recovery it must be shown that the failure to
39 give signals was the proximate cause of the accident, and that the burden of proving contributory negligence is on the plaintiff. Penn. Co. *v.* Rathgeb, 32 Ohio State., 72.

The answer to this proposition is twofold. First, this is not statutory action. It is true that the failure to sound the whistle and to ring the bell is alleged as negligence on the part of the defendant, but the case stated in the petition is clearly upon the common-law liability of the defendant. The statute, however, may be referred to to determine what constitutes negligence in Ohio as to giving signals on approaching a crossing. Second, if it were an action under the statutes, I do not think the rule relating to the burden of proof would thereby be changed. The contrary has been held by the Supreme Court of the United States. Northern Pacific R. R. Co. *vs.* Mares, 123 U. S., 710–721.

The next ground for motion for new trial is that the jury disregarded the charge of the court. I do not think this is sustained. It was conceded upon the trial that the plaintiff herself had no recollection of what occurred at the time of the accident, and therefore could not testify. She was placed upon the stand and a question put to her, but the excitement of the situation brought an epileptic fit upon her and it was necessary to take her from the stand and away from the court-room. It was then stipulated that she could remember nothing about the accident. The mother, however, who was riding with her daughter and driving, testified that they drove very slowly as they approached the track, and that both she and her daughter were continually looking and listening. A short distance before they reached the crossing, according to her testimony, they stopped and looked and listened. Her testimony therefore tended to prove that all the precautions that were necessary
40 were taken by her and by her daughter, and therefore that the negligence complained of on their part did not exist.

It is further urged that the verdict is against the weight of the evidence. I have examined the transcript of the evidence and am satisfied that the case was one for the determination of the facts by the jury, and that, whatever may be my own opinion as to the correct findings of fact to be made, it is my duty to leave the parties to abide by the verdict.

The motion for new trial will be overruled.

This case was tried at the June term. The motion for new trial was argued at Cincinnati, just before the present term of the court at Columbus. The verdict was for $5,000. The counsel for the plaintiff, desiring that there should be no review of this case by the Supreme Court, now moves for judgment for the amount of the verdict without interest. Counsel for the defendant, on the other hand,

insists that the judgment shall be with interest from the date of the verdict until the entering of the judgment. Counsel for the plaintiff claims that this court should follow the law and procedure of Ohio in matters not otherwise provided for by the laws of the United States, including the entering of judgments in cases of tort, and refers to the Revised Statutes of the United States, section 966. He refers also to section 3181 of the Revised Statutes of Ohio, which provides for interest upon all judgments, decrees, and orders of any judicial tribunal for the payment of money, but not for interest upon verdicts, and he insists that the judgment should be for the amount of the verdict without interest.

The contention of counsel for the defendant is that the provisions of section 966 of the Rev. Stat. of the United States and of section 3181 of the Revised Statutes of Ohio with regard to interest on
41 judgments are substantially the same, and that the construction of the statutes should be the same; also that under sec. 5375 Revised Statutes of Ohio a judgment becomes a lien on the lands of the judgment debtor within the county from the first day of the term, and so in the Federal courts the judgment becomes a lien on the lands of the judgment debtor within the jurisdiction of the court from the first day of the term at which it was rendered. Massingall *v.* Downs, 7 Howard, 760. His argument is that in Ohio under this statute judgments have always drawn interest from the day they become liens, quoting from the decision of the Scioto district court, 1859, Knible *vs.* Connolly, 1st Western Law Monthly, 402, as follows:

"A judgment rendered in an action pending at the first day of the term draws interest from that day and includes interest on the debt up to that day. Judgments on confession in actions commenced during the same term take effect only from the day of entry, drawing interest from that day and include interest on the debt up to that day."

Sproot's Ex'r *v.* Cutter, Wright's (Supreme Court) Reports, 157, 1832. "Interest will be allowed on awards and verdicts where payment is delayed up to the time of judgment."

He also cites Redfield *v.* Ystalyfera Iron Co., 110 U. S., page 177; Owens *v.* B. & O. R. R. Co., 35 Fed. Rep., 715; Steamship Co. *v.* Merchant, 133 U. S., 375, 379; New York Elevated R. R. Co. *vs.* Fifth National Bank, 118 U. S., 608; The Patapsco, 12 Wallace, 451.

Counsel for the plaintiff in answer to the citation of Quebec Steamship Co. *vs.* Merchant, and New York Elevated R. R.
42 Co. *vs.* Fifth National Bank, cities Baily *et al. vs.* The Mayor, &c., of the City of New York, 7 Hill, 146, and refers to the fact that in the State of New York interest is by statute allowed from the date of the verdict.

I have conferred with the circuit judge upon this question and the conclusions in which we concur are as follows:

"That it is proper to allow interest on the verdict from the date of its rendition up to the entry of judgment. This was done below in Quebec Steamship Co. *v.* Merchant, 133 U. S., 376, and the

Supreme Court sanctioned it and entertained jurisdiction. It does not appear that the practice was rested upon any New York statute. See to the same point Gunther *vs.* Liverpool and London and Globe Insurance Company, 10 Federal Reporter, 830, where Benedict, D. J., says: "The item of interest on the judgment from the day of the rendition of the verdict to the day of entry of the judgment, amounting to some $500, may be allowed. The delay was caused by a stay of proceedings during the pendency of a motion for a new trial. This delay should not be at the plaintiff's expense. The payment of interest meanwhile — properly be deemed a condition attached to the stay, or if not, an entry of the judgment is of the date of entering the motion for new trial might, if necessary to avoid damages to the plaintiff, be permitted; but I consider the item of interest on a verdict within the equity of the statute (sec. 966), and for that reason taxable. See National Bank *vs.* Mechanics' National Bank, 94 U. S., 439, and Dowell *v.* Griswald, 2 Sawyer, 24." To the same effect see 20 Blatchford and 13 Rep'r, 391. In Gibson *vs.* The Cincinnati Enquirer Co., 5 Central Law Journal, 446 (this circuit, Ohio), the rule was laid down that where entry of judgment is delayed by acts of the opposite party interest on the verdict is proper, whether the action is in contract or tort. If
43 the action is upon contract the verdict should draw interest from the first day of the term; if "*ex delicto*" from the date of the rendition of the verdict.

The judgment will be entered with interest from date of verdict. This will give the defendant the right to sue out its writ of error. Where the law will sanction it we should so apply it as to give the losing side an opportunity of review.

44 And afterwards, to wit, on the 12th day of December, A. D. 1890, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal B, p. 268.

This cause, coming on this day to be further heard upon defendant's motion for a new trial, was argued by counsel and submitted to the court; on consideration whereof the court doth overrule said motion; whereupon counsel for plaintiff moved for judgment in her favor for five thousand dollars, being the amount of the verdict herein, but counsel for defendant insisted that the true and lawful amount for judgment was five thousand dollars with interest thereon from the date of the verdict to the date of this entry. Considering whereof the court orders and adjudges that the plaintiff recover from the defendant said sum of five thousand dollars with interest thereon from June 10th, 1890, the same being the date of said verdict, to this 12th day of December, 1890—that is to say, for the sum of five thousand one hundred fifty-four and $\frac{17}{100}$ dollars, together with her costs in this cause expended, taxed at $—.

Stay of execution is allowed until January 15, 1891, in accordance with the rules and practice of this court, to enable defendant

to prepare and present for allowance her bill of exceptions
45 herein and to institute proceedings in error and file supersedeas bond, which is hereby fixed at $10,500.

And the plaintiff thereupon, by her counsel, excepted to the said judgment that it should have been for the amount of the verdict only, and offered and prayed to be allowed to remit the excess over that sum, to wit, the interest aforesaid; which offer and prayer the court refused; to all which the plaintiff then and there excepted and her exception was by the court allowed.

46 And afterwards, to wit, on the 12th day of December, A. D. 1890, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal B, p. 268.

This day came the defendant, by its counsel, and within the time allowed by the court and extended at the June term thereof for the year 1890 for thirty days after the adjournment of the same here presents to the court its bill of exceptions taken on the trial of this case at the said June term of said court, which is allowed, signed, and sealed by the court and ordered to be made a part of the record in this case.

And at the same time the said defendant presented to the court its bill of exceptions No. 2, taken on the hearing of the motion for a new trial herein, and the same being found to be correct the same is allowed, signed, and sealed by the court and ordered to be made a part of the record in this case.

And afterwards, to wit, on the 17th day of December, A. D. 1890, the following bill of exceptions was filed in the clerk's office of said court clothed in the words and figures following, to wit:

Bill of Exceptions.

47 In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

EMMA GRIFFITH, Plaintiff,
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY, Defendant.

Bill of exceptions.

Be it remembered that on the trial of this cause in the circuit court of the United States for the southern district of Ohio, eastern division, at the June term thereof for the year 1890, the said plaintiff and the said defendant, each on their respective parts, called and examined as witnesses the persons hereinafter named, and offered the testimony as shown in the following bill of exceptions, to wit:

48 *Plaintiff's Testimony.*

Mrs. ESTHER GRIFFITH, being duly sworn, testified as follows:

Direct examination by Judge HUNTER:

Q. Your name is Mrs. Esther Griffith?
A. Yes, sir.
Q. Do you live in Licking county?
A. Yes, sir.
Q. Are you the mother of the plaintiff, Emma Griffith?
A. Yes, I am.
Q. Do you remember the occasion of the injury to your daughter by a collision with a railroad train on the 1st of August, 1888?
A. Yes, sir.
Q. State to the jury, Mrs. Griffith, how far you live from Newark.
A. We live about 12 miles—between 11 and 12 miles from Newark; between Hebron and the reservoir, southeast of Hebron.
Q. State to the jury about you and your daughter—how you started from home. How did you start from home?
A. We started from home between ten and eleven o'clock, my daughter and myself.
Q. Your daughter Emma?
A. Yes, sir.
Q. What then? What were you in?
A. In a phæton buggy?
Q. State to the jury what occurred in the neighborhood of Locust Grove crossing.
A. Well——
Q. How far south is that from Newark?
A. About 3 miles, I think, from Newark.
Q. Go on and state now.

49 A. Well, my daughter and myself started to Newark on the first day of August, 1888. We were on what we call the Old Ridgley tract road. I was driving myself, and after crossing at the bridge, over what we call Hog run, a little run or creek there, we could see the railroad plain. We were watching for the noon train.

Q. How far was Hog Run bridge on the highway from the crossing?
A. Not quite a quarter of a mile.
Q. Go on.
A. There is a little hill goes up from the bridge; as we went up the hill we could see in a kind of alley or hollow. We could see quite plain. We drove on very carefully, and there was no sign of a train nor anything like it at that time. We went up to the hill, and when we got to the top of the hill there was a field on this side (indicating right side), a kind of raise. The field was raised and the road was cut down as they cut roads.
Q. You say "this side;" which side do you mean?

A. On the right-hand side as we were going to the railroad, and in that field was corn. The corn was in full height at that time, and when we got to the top of the hill we stopped and listened for the noon train, and we listened there for some time and then we thought that there was no train——

Q. Just tell what you did.

A. We didn't hear no sign of a train, so we went on very slow down the hill.

Q. About what time was it when you got there?

A. It was very close—it must have been twelve o'clock, for it was the noon train that comes in at 12 o'clock. We went down the hill slow, and as we would come down the hill there is a bank that
50 has been cut down on the side of the road, and on this side (indicating right side) we could not see the train, even when it was coming around there, until we came within so many yards of the tract. When the horse got his two forefeet on the track we seen the train coming just like lightening within a few yards of us. My daughter throwed up both hands and says, "Oh, ma!" That was all that passed between us. Instantly the horse was struck in the neck and shoulder and was whirled around just like lightening, and we were dragged around on the side and thrown; the horse was dragged away and the harness all torn to pieces, and the buggy all torn every way. My daughter was out and I was knocked senseless, and when I come to myself——

Q. When you came to yourself how far were you from the crossing?

A. I was about as far as from here to that door from the crossing myself, and the horse was about as far again as that from me, and I was lying alongside of the tract with my head towards the horse when I came to.

Q. What did you do then?

A. I raised to me feet and found myself bleeding at the mouth. My clothes were torn off; my dress was torn clear off, and the trimmings were all torn out of my bonnet. I had a lick on the head and my limbs were just that I could hardly stand, and my arms were to painful to move from the way that I had been beaten. I looked and I could see the train a distance off going, just as far as I could see, just as fast as it ever went, and I looked for my daughter and I could not find her, and I was terribly frightened. I thought they had dragged her away and I went to rubbing my hands; I could not come to myself and I says, "Where is my child? My child is killed."

51 Q. Just tell what you saw.

Q. With that I went forward to where the rest of the things was, and I saw a piece of her dress coming out from underneath; a piece about that large (indicating), and I discovered all that was on her. The piece of the buggy was on her and the things that we had in the buggy. We had a good many things in it that we were taking to town, and they was all turned on her, and she was lying on the ground on her face, and I got the things off of her, and when I got her onto her feet she came to. She was senseless

when I found her, and there was a terrible cut across her head. It was about like that (indicating on forehead); it looked like a piece of beefsteak. That is the only thing I could compare it to, and the blood was just pouring from her face & mouth down to her shoes. She looked just like she had been dipped in blood; and I got her on her feet and I tried to fetch her to herself. I looked around and found that I was all alone, with no friend or anybody else, but I thought they would come back.

COURT: Never mind what you thought.

Q. Do I understand you to say that your daughter was senseless?

A. She was unsenseless.

Q. How far from the crossing was she when you found her?

A. About as far from the crossing as from here to that railing.

Q. What did you do with her?

A. I tried to get her to the next neighbor, Mr. Kinney's house. I put my arm around her and tried to take her along. She didn't know anything. She would only say the same thing over—ask what had happened her. She would ask me over and over what had happened. I saw one of their sons out and I called—

52 when I got in sight of Mr. Kinney's I saw one of their sons out by the barn and I called to him, and I asked if he would please to come and help us, and he run to me and took the other side of my daughter and got her over around the house, and we got some water and tried to wash her head, and I seen she was going to faint on my shoulder and I asked the young man to help get her in the house, and we started to get her in, but she fainted on my shoulder. We got her in the house, finally, and laid her down on a little lounge-bed and sent for the doctor; got one of Kinney's sons to go for the doctor to Newark, and got the other one to go home and tell them what had happened.

Q. How soon did she get sensible?

A. She didn't come to for a long time.

Q. How long; that day?

A. No, sir; no, sir; she didn't.

Q. How soon did she come to her senses again?

A. It was some days before she could know anything.

Q. How long did she stay at Kinney's?

A. She only staid there until the next day.

Q. What was done with her?

A. She was taken home. She was put in a covered wagon and brought home; just laid on a feather bed put in the bottom of a wagon.

Q. How long was she confined to her bed?

A. She was confined to her bed a great deal of the time from that on for a year afterwards; that she was not to be trusted to herself any time without somebody taking care of her day and night.

Q. Mrs. Griffith, when you stopped at that place at the top of this bank where you say you stopped and listened——

53 A. Yes, sir; we did.

Q. Did you hear any sign of a train?

A. No, sir; there was no sign—not a particle of sign.

Q. Did you hear any whistle?

A. No, sir.

Q. Did you listen for the whistle?

A. Yes, sir; we did—very carefully.

Q. Did you hear any sound of an engine bell?

A. No, sir; there was no bell.

Q. Had you any notice, Mrs. Griffith, that this train was approaching before it was run onto you?

A. No, sir; not until the horse had his feet on the track.

Q. How did you drive down this bank towards the track? State at what rate of speed or what care you used.

A. I went down slowly. Our horse was very quiet and went very slowly, and I was going very slowly.

Q. What kind of a day was it?

A. A very warm day; still day; the first day of August.

Q. Was it a clear day?

A. Yes, sir; it was, and the sun was very hot.

Q. How was your daughter's health before this accident?

A. My daughter was perfectly healthy. She was the healthiest child that I raised—the strongest.

Q. What has been her condition since this injury?

A. Her condition has been very serious—very serious.

Q. How is she affected?

A. She is affected in the brain.

Q. How does it show itself?

A. Well, she is not—she has spells; whenever we speak of
54 anything or she hears of any accident or anything in that way it throws her into convulsions.

Q. How does she act when she has these convulsions? Describe it as well as you can.

A. I don't know whether I can tell or not. It takes three or four to hold her.

Q. About how often do these convulsions occur?

A. She used to have them every day, sometimes a good many a day; right after she was hurt she had a great many. They commenced the next day. The next morning when the train came along and whistled in front of Mr. Kinney's it throwed her right into convulsions. She had about seven or eight on that day.

Q. What effect does talking about her injury, of what happened at the crossing, have upon her?

A. It has such an effect upon her that it throws her right into convulsions.

Q. When did she have the last one?

A. Yesterday or day before.

Q. When she is in these convulsions what motion does she make?

A. It is hard to tell; she makes every kind, and screams.

Q. What motions does she make with reference to her head?

A. She takes her hand always at this place (indicating on forehead) and she will take her finger and trace this way and that way right in the shape that the cut was on her head, and will strike her head at whatever things or at different things; if we don't hold her

she will strike her head against anything. She wants to tear it, too, with her hands.

55 Q. Do you know whether she has any recollection as to what took place on that day?

COUNSEL FOR DEFENDANT: She cannot know.

COURT: I do not see how that can be competent.

COURT to witness:

Q. Where is your daughter now?
A. She is not in here now; she was awhile ago.
Q. She is in the city?
A. Yes, sir; she is very weak and cannot stand much, and we want her not to be here only as little as possible.

Judge HUNTER:

Q. I believe you stated that the train that caused the collision did not stop. Did the train stop?
A. No, sir.
Q. Did it stop on the return?
A. Yes, sir; about three o'clock.
Q. Were you at Kinney's then?
A. Yes, sir.

Last question and answer objected to and objection overruled.

Q. How soon after this train passed north did another train pass north?
A. About a quarter of an hour, I think.
Q. What kind of a train was it?
A. Freight train.
Q. Is your hearing good?
A. Yes, sir.
Q. Was it good at that time?
A. Yes, sir.

56 Cross-examination by Judge COLLINS:

Q. You say that was on the first day of August, 1888?
A. It was on the first day of August, 1888.
Q. It was a clear day?
A. Yes, sir; it was a clear day; very warm.
Q. It was warm and the sun shining?
A. Yes, sir.
Q. It was a still day?
A. A still day.
Q. And you were traveling in what was called a phaeton?
A. In a phaeton buggy.
Q. Will you describe that to the jury, please?
A. It was a phaeton buggy and horse.
Q. There was a body and top: what kind of a body was it?
A. The body was good and the top was good.

Q. What kind of a top? Just describe the top.
A. Like all phaeton-buggy tops.
Q. Cover over it?
A. Yes, sir.
Q. And side curtains and back?
A. The curtains were not on.
Q. There were side curtains to it?
A. There was side curtains to it, but they were under the seat; nothing but the top.
Q. Which side were you riding on?
57 A. On the driving side.
Q. You were on the right side and the train was coming from the south?
A. Yes, sir.
Q. And that is the side you were on?
A. Yes, sir; I was on the right side.
A. And it was coming from the direction—you were on the side from which the train was coming?
A. Yes, sir.
Q. Now, you say you stopped on the hill?
A. We stopped on the top of the hill.
Q. How far is that from the railroad crossing?
A. I suppose about fifty yards; maybe a little more.
A. A hundred and fifty feet or more. Now, what rate of speed did you say you went as you started down towards the crossing?
A. We were going down very slow listening for the train, as we knew the noon train——
Q. Please answer my question, and if there is anything else Judge Hunter will ask about it. Now, this hundred and fifty feet from the crossing where you stopped on the top of the hill——
A. The top of the hill.
Q. You say you drove your horse slowly down the hill?
A. Yes, sir.
Q. And you say there was a field of corn on your right?
A. Yes, sir.
Q. Was that above—and you didn't see the train, you say?
A. No, sir.
Q. If it had not been for the corn how far could you have seen?
A. Well, I don't know. I could have seen a little ways.
58 The field is raised a little up and the road is cut down.
Q. About how much is it cut down?
A. Cut down a good bit.
Q. About how much?
A. I could not tell exactly. I suppose about as far as from that there down here (indicating); maybe a little higher.
Q. That would be four or five feet—something like that?
A. I think so.
Q. There would be no trouble in seeing over the top of that out of your buggy?
A. Not if there was no corn there; we might see.

Q. Is the bank high enough any place to prevent you seeing the railroad track some distance down there?

A. Near the railroad it is too high to see.

Q. What distance is it there that it is too high?

A. About a hundred and fifty yards from the railroad.

Q. But you must remember that it is only fifty yards where you stopped.

A. But further back there is a low place; back.

Q. But we are not interested in the low places back; what we are talking about now is from the place where you stopped until you *you* get down to the track. How much of that distance from the top of the hill, as you call it, down to the railroad track that you cannot see?

A. Could not see from where the top of the hill is.

Q. Is that height about four or five feet—does that continue clear down to the railroad track?

A. Not quite that high; very near it.

59 Q. Four or five feet would be the same about all the way down?

A. The middle of the bank would be higher.

Q. As you went down it had been cut down and there was a little ridge there; how high was the highest part of that bank?

A. About 4 or 5 feet.

Q. And you say it would be about 4 or 5 feet; that would be the height of that bank in the highest place?

A. Yes, sir.

Q. And that the balance of the distance it would be less?

A. Very little.

Q. It would be some less?

A. Very little.

Q. About how little?

A. I should thing it would be some two or three feet less, maybe.

Q. Then there would be one place where it would be four or five — high and the balance of the places would be 2 or 3 feet less; then that is your statement, I believe?

A. I think so.

Q. Now, there is a place where you come down there as you come on down the road where you get past the corner of the field where there is corn, isn't there?

A. On this (indicating right) side all the way down I could not see the railroad all the way along; I could not see the railroad all the way along.

Q. What I want to know is if there is not a place where you come to where the corn stops.

A. No, sir; the corn was clear down, pretty near to the railroad.

Q. There is a place where the corn stops and the railroad——

A. It is so little——

Q. Has Judge Hunter been instructing you about this matter?

60 A. I didn't need any instruction, because I was there on the road myself.

Q. Will you kindly answer my question? I am perfectly good-humor- and you are a stranger to me and I am here simply for the purpose of taking care of the interest of my client. Will you?

A. I will do so.

Q. There is a place where that field comes up to the railroad lands, is there not—that corn-field didn't come right up to the rail of the railroad?

A. The corn-field goes right to the railroad and the corn comes very near to it. There is only a little bank there that the corn don't cover.

Q. Do you say that the corn comes right up to the rail?

By the COURT: How far was it from where the corn stopped to the railroad track?

A. I will describe it to you as plain as possible. Say the railroad is here; here is the corn-field right here—comes right to the railroad. There is a little bank raises right up to the railroad there. The corn is right on down there, and that bank there is a hill—both sides. We were coming down.

Q. You don't answer the question yet. How far is it from the bank to the rail?

A. About as far, I should think, about as far as from here to that chair.

Q. So that there was only a space of about six feet from the track to where the corn began?

A. Just about that much, I think.

61 Judge COLLINS: Mrs. Griffith, don't you know it is twenty-four feet back there from the rail to the point where you can see the railroad track? You don't pretend to give accurately the distance back where this corn-field stops and the railroad lands begin? I don't mean the track, but the lands on which the track is located. You don't pretend to give that accurately?

A. I don't understand you.

Q. I mean the point in the road going down there where the corn-field ends; the distance back from the railroad track. You don't pretend to give that, do you?

A. I think I gave——

Q. Now, Mrs. Griffith, did you ever go there after this accident to makes an examination to see what the distance is after you pass the corner of this corn-field from that to the west rail; you were going east, were you?

A. We were going east; yes, sir.

Q. Now, did you ever go back there to see what the distance was from the corner of the corn-field to the west rail?

A. Yes, sir; I have been there since.

Q. Now, about how far is it?

A. Just about the distance I tried to show you.

Q. Wasn't it about twenty-four feet?

COURT: She says not. The corn-field is one thing and the corn growing in the field is another.

By Judge COLLINS: How far is it from where the corn ends to the west rail?

A. Well, I suppose something about the distance from here to there; from this chair to that one.

62 Q. The corn went up that close to the railroad track. Don't you know that that railroad track there is a hundred feet wide?

A. I mean by the side of the railroad.

Q. Do you understand? I am asking you about the distance from where the corn ended to the west rail. Remember that the railroad track is a hundred feet wide and that this track is in the center of that.

Objection by plaintiff's counsel.

COURT: Say supposing.

Q. Supposing, then, that this railroad track, and by that I mean the lands occupied by the railroad, is a hundred feet wide; then the corn-field would be fifty feet back, wouldn't it, from the west rail?

A. That is the way you put it.

By the COURT: How far was it from the end of the corn to the place where the train struck the horse?

A. It was about as far from the corner of the field—of the corn was from where they struck the horse—it seemed to me must be about as far as from that corner of the room to the other corner—to where it struck, from the corner of the field.

By Judge COLLINS: That would be something near a hundred feet or seventy-five feet, wouldn't it?

(COURT: That's the way a woman always puts it—from here to there.)

Q. Who is your daughter's physician?

A. My daughter has to have three physicians.

Q. Who was her physician immediately after she was hurt?

A. Stimson.

Q. Where does he live?

A. Newark.

63 Q. Is he here?

A. No, sir; not that I know of. I don't know. He may be.

Q. How long did he treat her after this accident?

A. He treated her for about nine days or two weeks.

Q. Did he ever treat her before that?

A. I don't remember.

Q. Didn't Dr. Stimson treat her for these convulsions before that accident?

A. No, sir.

Q. Didn't she have convulsions before that accident?

A. No, sir; never.

Q. And didn't Dr. Stimson treat her for them?

A. No, sir.

Q. The physician that did treat her is not here as a witness on her behalf, is he?

A. The doctor is here.

Q. Was some other doctor treating her at the time?
A. Yes, sir; doctors treated her for a long time.
Q. But what doctors?
A. There was two or three doctors here that have treated her.
Q. You know their names, don't you?
A. Dr. Lacrone; he treated her at that time after she was hurt.
Q. Dr. Stimson quit treating her?
A. Yes, sir; he treated her for all the time after that.
Q. Dr. Stimson treated her eight or nine days. Where does Dr. Lecrone live?
A. In Hebron.
Q. I understoon that there was two or three treated her; was there *there* some other one?
64 A. Yes, sir.
Q. Well, who?
A. Dr. Lattimore.
Q. Dr. Lattimore, of Newark; did he treat her?
A. Yes, sir.
Q. What is your daughter's age?
A. She is twenty.
Q. 20 now?
A. 20 past.
Q. Mrs. Griffith, you had been in the habit of crossing that place before, hadn't you?
A. Yes, sir.
Q. How long had you known it?
A. For a long time.
Q. About how long?
A. Lived up there for about eight or nine years.
Q. And you have known that crossing all of that time?
A. Yes, sir.
Q. How frequently have you driven over it?
A. Drove across it many times.
Q. About how frequently did you go over it that summer before this accident?
A. Several times; I don't remember just exactly how many times.
Q. A good many times?
A. I don't remember just how many times. I had crossed it several times that summer.
Q. Did you go to Newark every week?
A. No, sir; not every week; it was too far.
65 Q. Whenever you did go you went that way?
A. Yes, sir.
Q. You knew the crossing very well, didn't you?
A. Yes, sir; I knew it.
Q. And your daughter knew it, too?
A. We did; and she was always very careful.
Q. Your daughter, when she went, did she drive herself?
A. No, sir.
Q. How would she go generally?

A. Go with us.

Q. And she was familiar with it; crossed it a good many times in her lifetime?

A. Yes, sir.

Q. The first action that either she or you did was her throwing up her hands just as the horse was over the first rail?

A. She throwed up both hands when the horse struck the rail; when she seen the train.

Q. That is, when she and you both discovered the fact that the train was coming?

A. Just as the horse had his feet on the rail.

Q. That was the first time that either you or she discovered the fact that there was a train coming?

A. Yes, sir.

Q. And she discovered it first?

A. We seen it about the same time.

Q. But she is the one that made the exclamation and threw up her hands?

A. All the time she had was to throw up her hands.

66 Q. And you saw it about the same time?

A. About the same time.

Q. And you were driving?

A. Yes, sir.

Q. And she was on the left side?

A. Yes, sir.

Q. And just as the horse got on the track she threw up her hands and made the exclamation which you have given?

A. She said, "Oh, Ma."

Q. Just as the horse's feet were on the track?

A. Yes, sir.

Q. Do you know this gentleman sitting at the end of the table there?

A. Yes, sir.

Q. What is his name?

A. His name is Rankin.

Q. Do you remember an interview that you had with Mr. Rankin a short time after this accident happened?

A. I saw him that day there.

Q. Do you remember of Mr. Rankin and a young gentleman by name of Broadus coming to your house to see you about this about the 11th of August?

A. He came there with somebody.

Q. You talked to him about this accident, didn't you?

A. Not very much.

Q. You did talk some?

A. I could not help but speak to him when he came into the house.

Q. You did talk to him about this accident?

A. Not much of anything.

67 Q. Did you talk any?

A. I believe he asked me a word or two.

Q. Didn't he ask you how it happened and didn't he ask you how you were driving?

A. I don't remember about him asking about that.

Q. And didn't you say that you drove from the top of the hill down to the railroad track on a jog trot?

A. No, sir; I told him that I went down slowly.

Q. Didn't you tell him in the presence of Mr. Broadus that you went *went* down there on a jog trot—from the top of the hill down *the* the railroad track?

A. No, sir; I told him that I went the natural way; the horse was walking down and was quiet.

Q. Then you did tell him something?

A. That is what I told him.

Q. And you did tell him how you went down? I will ask you again if you didn't tell him and Mr. Broadus that you went from the top of the hill down to the track on a jog trot until you discovered the train right onto you?

A. No, sir; I did not.

Q. Didn't you tell him that?

A. No, sir; I did not.

By a JUROR: Is that a county road that you have been crossing over the railroad so long?

A. Yes, sir.

Q. Have the railroad company got a guid- board calling the attention of the people to look out?

A. They have one a little further along—further up towards Mr. Kinney's.

68 By the COURT: How far away?

A. Quite a little piece from the crossing.

Q. About how far? As far as from here to that mantel?

A. As far as from here across the room to the crossing.

Q. You knew that the crossing was there, whether there was any sign there or not?

A. I knew there was a crossing there.

Q. Was that a top buggy?

A. Yes; it was a top buggy.

Q. Was the top up or down?

A. The top was up.

Q. Were the side curtains on or off?

A. They were under the seat and the back part was rolled up because it was very warm that day. We had nothing but the top over us.

Q. Were you and your daughter talking together up to the time she threw up her hands?

A. No, sir; we did not talk at all. We were talking up on the hill when we were listening for the train, and that was all that passed between us, and we went down slowly until the horse got his feet on the railroad track.

Q. I understand you to say that from the time you passed the corn until the horse was struck the distance was about as far as from that corner of the room over to that corner of the room.

A. From the corner; I mean from the crossing to the corner of the field up where the corn was up in the field cater-cornered across the corner if would be that far—that is, where the corn was inside of the field. There was a fence outside of it.

69 Q. From the time you passed the end of the corn down to the time the horse was struck where were you looking?

A. I was listening to see if the train was gone by; to see if we could see it.

By Judge COLLINS: You say you were looking to see if the train had passed?

COURT: She said she was listening.

Q. Which way were you looking?

A. Looking south.

Q. Towards the station?

A. Towards the station; I meant the station on the pike. I was looking south.

Q. Which was was your daughter looking?

A. I suppose she was looking the same —.

Q. I am not asking that.

A. That is the way she was looking, then. We were going down to the railroad and looking down that way; looking down towards the rail- to see if we could see the train and listening for the train.

Q. Looking straight forward?

A. No, sir; looking south; down towards the railroad track.

69½ Redirect examination by Judge HUNTER:

Q. Does the railroad pass through a cut when it comes to that crossing?

A. Yes, sir.

Q. Do you know how deep that cut is?

A. Well, I should think it was about as deep as from that (indicating) down. It was pretty deep.

Q. Do you mean the upper cornice there?

A. Pretty near—that is, right down where the railroad is.

Q. Now, as the county road approaches that crossing, state whether it is cut down at the crossing.

A. It is cut. The road that comes down is cut on each side a little and comes down to the railroad. There is a hill, though, to go down—on both sides to go down—to the railroad.

Q. In going down that hill, state whether or not there is a bank on each side of the county road.

A. Yes, sir.

Q. State, Mrs. Griffith, how near did you have to get to the iron rail before you could look along the track.

A. The horse had his feet on the rail.

Q. How near does a person have to get to the iron rail before they can see along the track?

A. I don't think they can see hardly until when they get to the railroad.

Q. I am asking about the track; the iron rail. How near would

you have to get to the iron rail before you could look along the railroad track south?

A. I don't think I could get hardly—I cannot tell exactly; I know that I could not see—I did not see until I was right on the track on account of this hill shutting off the view—a
70 view and the bend in the road.

Q. Is there a curve in the railroad?

A. There is a bend in the railroad; there is a curve there.

Q. Which direction from the crossing is the curve?

A. The curve comes this way (indicating).

Q. South or north?

A. On the south side.

By a JUROR:

Q. Did it kill the horse?

A. Yes, sir. It killed the horse, broke the buggy, and never left a piece of it; broke everything, harness and all.

71 J. W. ETNIRE, being duly sworn, testified as follows:

Direct examination by Judge HUNTER:

Q. Where do you live?

A. In Licking county.

Q. What part of Licking county?

A. About one mile and a quarter west of Jackstown, on the national pike.

Q. What is your business?

A. Farmer.

Q. Do you remember the occasion when this collision occurred at Locust Grove crossing?

A. Yes, sir; I do.

Q. Were you on the train?

A. Yes, sir.

Q. What car were you on?

A. I was on the hind car.

Q. How many cars on the train?

A. Well, they always——

COURT: How many were there that time? No matter how many they always carried.

A. 2 coaches.

Q. How were the windows of the car you were in, up or down?

A. The window that I occupied was open.

Q. Did you hear any signals made?

A. Yes, sir.

Q. What signals did you hear?

72 A. I heard them whistle just after they crossed—that is, between the railroad—that is, the Hog Run road bridge and the crossing.

Q. You mean the Hog Run bridge—railroad bridge?

A. Yes, sir. We have two Hog Run bridges. One is a county bridge.

Q. Did you hear the bell ring?
A. I did not hear it.
Q. Is your hearing good?
A. I am defective in hearing in the left ear.
Q. Can you hear me distinctly?
A. Yes, sir.
Q. Were you paying any attention to the train as you were coming along there?
A. Only its speed. I was talking about the speed to the gentleman who was sitting beside me.
Q. Was your attention upon the train as you were approaching Locust Grove crossing?
A. Yes, sir.
Q. Thinking about it?
A. Yes, sir.
Q. Were you thinking anything about as to whether they would stop at Locust Grove crossing or not?
A. Yes, sir; when they whistled for the crossing or station my attention was drawed as to whether they were going to stop there or not.

Cross-examination by Judge COLLINS:

Q. You say the whistle was blown for this crossing or station?
A. Yes, sir.
73 Q. And you say it was somewhere near Hog Run bridge?
A. It was after they had crossed the bridge.
Q. The bridge on the railroad?
A. Yes, sir.
Q. You don't know the distance from Hog Run bridge up to the crossing?
A. No, sir; I could not tell you the distance.
Q. You know that the whistle was sounded after they crossed that bridge.

Objection by counsel for plaintiff. The witness has said that the whistle was blown.

COUNSEL FOR DEFENDANT: Of course he did, and just after they crossed the Hog Run bridge.

Mrs. EMMA GRIFFITH, called and duly sworn:

It is admitted between counsel for plaintiff and counsel for defendant that Mrs. Griffith will swear that she has no recollection as to what took place on that day; also admitted that she is the plaintiff in the case.

74 JOHN W. SPICER, being duly sworn, testified as follows:

Direct examination by Judge HUNTER:

Q. Where were you living on the 1st of August, 1888?
A. Edward Lesis'.
Q. Where at?

A. In Licking county.
Q. Near Locust Grove crossing?
A. Yes, sir.
Q. Do you remember the occasion of the collision between the railroad train and Mr. Griffith's folks?
A. I did not see it.
Q. Do you know——
COURT: Do you remember the time when it occurred?
A. Yes, sir.
By Judge HUNTER: Where were you when that train — approaching Locust Grove crossing?
A. I was in the meadow east of Hog Run bridge that crosses Hog run, about probably two hundred steps.
Q. Do you mean the railroad bridge?
A. The railroad bridge that crosses Hog run.
Q. Did you observe that train as it went by?
A. I did.
Q. How did you come to observe it?
A. Well, sir; we usually went to dinner when the passenger came along. There was a boy there and we wondered what had become of the passenger, and I said it would be here directly.
COUNSEL FOR DEFENDANT: Just leave that out.
COURT: He can state that his attention was directed particularly to it.
75 Q. Did you look at the train as it went by?
A. I did.
Q. State what signals it gave.
A. It gave a signal just—it commenced to whistle before they entered onto the bridge and probably whistled on until they had crossed. They seemed to be going along a pretty good gait, and that is about all I know. I didn't pay any particular attention to it. I didn't hear anything else.
Q. Did the bell ring?
A. No, sir.
Q. Is your hearing good?
A. Moderately.

No cross-examination.

SOLOMON HOLTZBERRY, being duly sworn, testified as follows:

Direct examination by Judge HUNTER:

Q. Do you live in Licking county?
A. Yes, sir.
Q. Do you remember the occasion when Miss Griffith was hurt by the B. & O. Railroad at Locust Grove crossing?
A. I was on the train at the time that the buggy was struck or the horse was struck. I didn't know who it was at the time when it was struck. I heard afterwards it was her.
Q. Well, that was about—that took place about two years ago?
A. Yes, sir.

Q. What car were you sitting in?

A. Smoking car.

76 Q. How many cars were on the train?

A. There was two that they rode in and the baggage car was on.

Q. How many cars between you and the engine?

A. The baggage car.

Q. Can you state whether the windows of the cars you were in were up?

A. The place where I was sitting was up.

Q. Do you remember when the train was approaching Locust Grove crossing; was your attention called to the train when it approached Locust Grove crossing?

A. When it approached Locust Grove crossing I was looking back to see whether I could see a coal train that we had passed at national road.

Q. What signals did that train you were on give approaching the crossing?

A. It whistled just when it crossed Hog Run bridge; that is all the signal I heard.

Q. Did the bell ring?

A. Not that I heard.

A. Did you have your head out of the window?

A. Yes, sir.

Q. Which side of the car were you on?

A. West side.

Q. Hearing good?

A. Pretty good; yes, sir.

Q. Did you see this accident?

A. I did.

Q. State what you saw to the jury.

A. I just put my head out; was going to look to see whether I could see coal train coming behind me. When I first put

77 my head out, looked in front first as I always do. Saw the horse just coming down the steep bank down to the railroad and it hit, and I saw a couple of persons; one went down towards the train and the other went towards the side of the hill.

Q. Where did it hit the horse; what part of the horse was hit?

A. Looked as if it was back about the foreshoulder.

Q. What became of the train?

A. I rode in it until I got to Newark.

Q. Did it stop?

A. Stopped when it got to Newark.

Q. Did it stop before it got to Newark?

A. No, sir.

Q. What rate of speed was it going to the best of your judgment?

A. I could not tell; I couldn't tell that; I expect it was going 30 miles an hour; maybe more; it was going a pretty good gait.

Q. Behind time?

A. I don't think it was.

Q. Did you stop there on your way back?
A. Yes; the train stopped and I got off.
Q. Did you notice where the horse was?
A. Laying alongside the track.
Q. Alive?
A. Laying just off the end of the ties.
COURT: He asked whether it was alive?
A. No, sir; it was not.
Q. How was the harness?
A. Didn't see any on him.
Q. How far was this horse lying from the actual crossing?
78 A. As near as I could make it, I expect it was 30 feet; maybe more. He was knocked a good ways.
Q. Did you see the buggy or the remnants of it?
A. I saw the pieces; yes, sir.
Q. Where were they lying?
A. Right alongside of the track—scattered along.

Cross-examination by Judge COLLINS:

Q. Mr. Holtzberry, how soon after the train crossed Hog Run bridge was it that you looked out of the window?
A. It was pretty soon. It ain't but a little piece up there.
Q. How far was the train from the crossing at the time you looked out of the window there?
A. I suppose it was 75 yards. When I first put my head out I saw the horse coming down the hill. The hill is straight down in there pretty near.
Q. The engine was 75 yards from the crossing?
A. I expect it was.
Q. And you were still further back?
A. I was in the smoking car.
Q. And you saw the horse as it was coming down the hill and it came right on and got onto the crossing as the train hit it?
A. Yes, sir.
Q. How far back was the horse and buggy when you first looked out—when you first saw it?
A. Pretty near down to the track; half way down the hill, anyhow.
Q. And it went right on?
A. Went on down as far as it could.
Q. It went right on and the train went right on and the result was they met right there?
79 A. They met on the crossing.
By the COURT: Did the whistle sound at that time?
A. No, sir; not that I heard.
By Judge COLLINS: What kind of a signal was that?
A. One long whistle as they crossed Hog Run trestle.
Q. Pretty loud?
A. Yes, sir; pretty loud.
By the COURT: How far back from the place where the horse was struck was the bridge?

A. ½ mile, I suppose; very near.

By Judge COLLINS: Pretty loud whistle? You had no trouble in hearing it?

A. Pretty loud; the same as they whistle for any station.

A. It could have been heard all around there?

A. Oh, yes. I live—sometimes I hear it six or eight miles.

Q. How far could it have been heard?

A. I hear it where I live. You can hear that whistle sometimes at Glenford.

Q. That particular whistle could have been heard a mile or two, couldn't it?

A. I could not say as to that.

Redirect examination by Judge HUNTER:

Q. When you saw this horse what was the driver doing?

A. It looked to me as if she had the horse's head pulled around with the left line trying to cross the road as far as she could; it looked as if she was pulling the left line.

By Judge COLLINS: It looked as if she was pulling to the left?

A. She was going——

Q. It looked as if she was going to try to beat the train to
80 Newark, if she could?

A. It looked as if she was going to beat the train to Newark if she got on the track.

By Judge HUNTER: You understood that she was pulling the horse to keep it from going upon the track?

A. It looks so to me.

Q. Why did you suppose that it looked as if she was going to race the horse to Newark?

COURT: Nothing of that kind is competent. He can state what he saw.

COUNSEL FOR PLAINTIFF: He stated that it looked as if she intended to beat the train to Newark——

COURT: I know, and that was improper and the jury ought not to pay any attention to that.

MATTHIAS GRAY, being duly sworn, testified as follows:

Direct examination by Judge HUNTER:

Q. Do you remember the accident where Griffith's daughter was injured?

A. I was on the cars at that time.

Q. Did you notice the train when it approached Locust Grove crossing?

A. No, sir; I did not know when it approached there; know nothing about that, because I am not acquainted with that place along there; but, about the time it struck, some person says, They have done somebody up, and I didn't think any more about it then.

81 Q. Where did that occur?

A. Right by where the buggy was smashed up at a crossing.

Q. Did you feel any shock of the collision or anything of that kind?

A. No, sir.

Q. Did you notice any signal being given as the train approached that crossing?

A. Only I heard the whistle whistle once above—as you come down. I don't know how far it was off.

Q. Did the bell ring?

A. No, sir; not as I heard.

Q. Did you see anything from the window as the train passed the crossing?

A. It appeared to me that I saw something like a hoop flying past the window as I was sitting on the seat.

Cross-examination by Col. KIBLER:

Q. You are a little hard of hearing, are you not?

A. I am hard of hearing in that ear (indicating).

Q. You had no trouble in hearing that whistle?

A. Sir?

Q. It was not any trouble for you to hear that whistle?

A. I am acquainted with it so well that I can tell the sound of it if I just happen to hear it.

Q. You did hear it?

A. I happened to hear it.

Q. And you remembered it?

A. I remember it.

82 W. F. DAVISSON, being duly sworn, testified as follows:

Direct examination by Judge HUNTER:

Q. Were you on the train that caused this collision at Locust Grove crossing?

A. Yes, sir.

Q. Do you remember of noticing the train as it approached that crossing?

A. Yes, sir.

Q. What signal was given?

A. I heard one long whistle was all.

Q. Did the bell ring?

A. I did not hear it.

Q. Where did the whistle sound?

A. I think it sounded after it left the railroad bridge that crosses Hog run.

Q. Do you recollect whether the windows of the car were open or not as you passed along there?

A. I sat next the aisle; another gentleman sat with me. I think the window was up in the seat we were in.

Cross-examination by Judge COLLINS:

Q. Pretty loud whistle, Mr. Davisson?

A. Loud as ordinary. I didn't see any difference in that respect.

83 Q. Where was it sounded?

A. My impression was that the train had crossed the Hog Run bridge.

Q. Was it the usual sound of the whistle for a station and crossing?

A. One long sound.

Q. Was it as loud as those whistles usually are?

A. Yes, sir.

Q. Mr. Davisson, you were on the train; you know the fact that a man in a passenger car cannot tell whether the bell is ringing or not?

A. I don't know. I did not hear any bell. I did not hear the bell; that is all I can say.

Redirect examination by Judge HUNTER:

Q. An engine bell—how far can you ordinarily hear an engine bell?

A. Well, I don't know. I was at the station there a good while; could hear them some days further than others.

Q. Can you hear an engine bell a mile?

A. I have heard them a mile.

Q. Does the railroad company seek to have good bells on their engines?

A. So far as I know, they do.

By Judge COLLINS: You can hear the whistle further than you can the bell, cannot you?

A. Yes, sir.

By Judge HUNTER: Is there a curve as this track approaches Locust Grove crossing?

84 A. Yes, sir.

Q. How much of a curve?

A. I don't know whether I can say. I am not acquainted with the degree of curves, but there is conside-able of a curve there. The curve commences some time after you cross the bridge and extends, I think, very near the crossing, if not quite at it.

By Col. KIBLER: How far is the crossing from the railroad bridg-?

A. From Hog Run bridge? I would not place it over a quarter of a mile. It might have been a little more.

By Judge HUNTER: Did you ever measure it?

A. No, sir.

JOHN NEAL, being duly sworn, testified as follows:

Direct examination by Judge HUNTER:

Q. Where do you live?

A. I live in the southern part of Licking county.

Q. What business?

A. Farming.

Q. Are you acquainted with the region of Locust Grove crossing?
A. Yes, sir; somewhat.
Q. Mr. Neal, did you look at that crossing and its surroundings?
A. Yes, sir; I have examined them to some extent.
85 Q. Did you do that with a view of testifying in this case?
A. Partially so.
Q. Mr. Neal, did you make any measurements?
A. Yes, sir.
Q. How far is it from the top of this declavity down to the track on the county road, approaching the track, going eastward on the way to Newark?
A. It is somewhere from forty to fifty yards, I suppose.
Q. What time was it that you looked at this ground?
A. Latter part of August.
Q. What part of August?
—. ——.
Q. What year?
A. 1889.
Q. Did you see it in 1888?
A. Yes, sir.
Q. Now, approaching the railroad track from the county Hog Run bridge, state what you can see with reference to the track coming along in a buggy.
A. Well, that depends somewhat on the crop that is in the field. When that is in corn you have no view of the railroad track for more than a half mile. You could run from three-quarters of a mile or near that.
Q. Suppose as you approach the track after leaving Hog Run county bridge—do you approach a hill?
A. Yes, sir.
Q. Well, go on now and describe as near as you can the situation of things going from there to the track.
A. It is upgrade continually from the time you cross the Hog Run bridge on the county road until you reach a point perhaps 100 yards or something near that from the crossing. Then there is a little basin; you descend and then ascend and reach another
86 *another* eminence, I should judge forty or fifty yards from the track.
Q. Now on top of that last eminence. Suppose the field south of it is in corn, is there any view of the track from that point?

COUNSEL FOR DEFENDANT: That is not a case for a hypothetical question.

COURT: Were you past there when the corn crop was in?
A. Yes, sir; I was past there the day of the accident.

COURT: He may answer.

By Judge HUNTER: You say you passed there the day of the accident?
A. Yes, sir.
Q. Was it in corn?

A. Yes, sir.

Q. How was its growth?

A. It was corn of good height; ten or twelve feet high.

A. From the top of that little eminence down to the track. State how the county road approaches that track and how it is graded; whether there is a cut.

A. Yes, sir; there is a cut. Formerly it was very steep, but it had been graded back some and the cut made, and it makes the slope longer than formerly.

Q. Does the railroad pass through a cut at Locust Grove crossing?

A. Yes, sir.

Q. How deep is that cut?

A. Well, I would judge that that cut was from 12 to 15 feet deep.

Q. How wide is that cut or was it at that time at the bottom?

A. At the bottom it is eighteen feet by my measurement.

Q. Then how does it slope up? I am referring to the railroad cut.

A. Well, it slopes about as steep as land will stay in posi-
87 tion; somewhere near 45 degrees, I suppose.

Q. Now, Mr. Neal, a buggy being driven down there, with one horse, down that declivity to the track, is there any point that the railroad can be seen until you get to the bottom?

COUNSEL FOR DEFENDANT: If he drove down there and made the observation he can answer the question; otherwise I object.

By the COURT: Have you driven down there in a buggy?

A. A number of times.

Q. When the corn was in that condition; when the crop was in about that state?

A. Yes, sir.

Q. I would like you to state—you say the slope of the cut was about forty-five degrees. What was the grade of the road about that time—was that as steep as the railroad?

A. It is not so steep; it has been cut back.

Q. I mean in August, 1888?

A. It was cut back then.

Q. About how far back was it cut; as far as across the room?

A. Well, I would judge, from the best of my recollection, that it is about forty yards. I made no measurement as to that.

Q. From the track at the crossing how far back was it graded; to the top of the ascent?

A. Where the grade was made?

Q. You stated that the slope of the railroad cut was about forty-five degrees?

A. Yes; the railroad cut.

Q. Now, then, the road, you say, is graded down from the top of the ascent; graded to the track. How far was it from the track back to the top of that grade?

A. To the eminence in the county road? I should judge
88 that was somewhere near forty yards.

Q. And a regular grade down to the track?

A. Yes, sir.

By Judge HUNTER: How near did you have to get to the track—well, was there any point from the top down to the track that you could see an approaching train until you got down to the track?

A. There was none until you got into the railroad cut.

Q. Is there a curve south of Locust Grove crossing in the direction the train would come coming from the south?

A. Yes, sir.

Q. Standing down in the railroad cut on the crossing, how far could you see along that railroad south?

A. Well, I suppose about three or four hundred feet.

Q. You stated the width of the railroad cut, state the width of the county-road cut as you went down the hill to the track.

A. At the bottom, that part that is about on the level with the tract, for vehicles, is sixteen feet.

Q. Does the county road go up on the other side, then, after crossing the track?

A. Yes, sir; on the east side.

Q. Mr. Neal, how far is it from Hog Run bridge to the tool-house—tool shanty—track-walker's shanty, or whatever it is called; the shanty was between Hog Run bridge and the crossing, was it?

A. Yes, sir; 840 feet.

By the COURT: That is from the tool-house to the railroad crossing?

A. From the Hog Run bridge—railroad bridge to the tool-house.

89 By Judge HUNTER: How far was it from the tool-house to the whistling post?

A. 510 feet.

Q. And how far was it from the whistling post to the crossing?

A. One thousand and eighty feet (1,080).

Q. What do you make the whole distance from Hog Run bridge to the crossing?

A. 2,430 feet.

Q. How long after the accident did you pass along there?

A. How soon after that day, do you mean?

A. Yes, sir.

A. Well, I don't know the exact time, but it must have been about 2 o'clock in the afternoon when I passed.

Q. Did you see the dead horse?

A. Yes, sir.

Q. How far from the crossing was it?

A. I should judge that it was 60 feet; made no measurement of that.

Q. How far were the remnants of the buggy?

A. About half that—30 feet.

Q. Did you see the harness?

A. Yes, sir.

Q. Where was it.

A. I cannot say just where they were, but they were there, scattered among the other things.

Q. On the horse?
A. I think not.
Q. Were you acquainted with Emma Griffith before this injury?
A. Oh, yes.
90 Q. What was her general health?
A. Good.
Q. Have you seen her since?
A. Oh, yes.
Q. What is her health now?
A. Very bad.
Q. Have you ever helped take care of her since she was sick—since the injury?
A. Yes, sir.
Q. What symptoms has she?
A. Symptoms, the word you used?
Q. Yes, sir.
A. Well, she has convulsions, and I suppose her convulsions——
COUNSEL FOR DEFENDANT: Never mind the convulsions. You are not a physician, are you?
A. That is why I put it in that way. I would not pretend to say what they are, because I am not a physician.
COURT: Did you see her this afternoon?
A. Yes, sir.
Q. Is that anything like it?
A. That is a sample.
By Judge HUNTER: Did you help take care of her during the first year she was injured?
A. No; that fall.
Q. Did you have anything to do with taking her from the place of the accident—that is, Mr. Kinney's house to her own home?
A. No; I was at her home when she came there.
Q. Did you have anything to do with her getting into the house?
A. Helped her from the wagon to the house.
Q. What was her condition then?
91 A. Well, it was just the same that it was when she was taken from the court-room awhile ago.
Q. Been acquainted with her ever since?
A. Yes, sir.
Q. Any change for the better, that you know of?
A. I see none.

Cross-examination by Col. KIBLER:

Q. Are you a relative of the parties?
A. No, sir.
Q. Did you put these figures down when you made the measurement?
A. Yes, sir.
Q. You are testifying from memory now?
A. I have a memorandum at home. I looked over it before coming up here.

Q. What do you say you made the distance from Hog Run bridge to the crossing?

A. 2,430 feet.

Q. How did you measure that?

A. With a tape line.

Q. Anybody with you?

A. Yes, sir.

Q. Who was it?

A. Judge Hunter and Mr. Griffith.

Q. Who held the other end of the tape line?

A. Mr. Griffith, I think.

Q. Are you able to tell from looking at your memorandum yesterday what the distances are?

A. From the stations we have named?

Q. Yes.

A. Yes, sir.

92 By Judge HUNTER: Were the measurements you made accurate?

A. Yes, sir.

By Col. KIBLER: After you got down to the railroad track how far did you say you could see south?

A. About 3 or 4 hundred feet (3 or 400).

Q. Did not measure that?

A. No, sir.

By Judge COLLINS: What is the grade of the public road coming up from the railroad track?

A. I could not tell you what that is.

Q. Is it the same?

A. No, sir; it has been cut down, so it is not steep.

By Col KIBLER: When you get to the top of the grade in the highway, going west from the railroad track, how much is the grade?

A. The height above the crossing?

Q. If you want it so.

A. Well, it is 12 or 15 feet, I judge.

EBENEZER GRIFFITH, being duly sworn, testified as follows:

Direct examination:

—. Are you the father of the plaintiff?

A. Yes, sir.

Q. Mr. Griffith, are you familiar with the Locust Grove railroad crossing?

A. Yes, sir.

93 Q. Describe that crossing and the approaches to it by the railroad and the county road to the jury.

A. Well, the way that we come down from the reservoir this way——

Q. That is going north to Newark?

A. Yes, sir; we come north and from the Hog Run bridge we strike a hill. You come up for about 300 yards——

Q. What direction does the county road go after crossing the Hog Run county bridge until it crosses the railroad track?

A. It comes up the hill and then you come straight towards the track.

Q. I mean how does it cross? What direction does the road go as it crosses the railroad?

A. It goes east.

Q. Very well; go on with your statement.

A. We come up to that corner on the top of the hill, then we make a straight shoot for the railroad—that is, the grade that comes down to the railroad—about, I think, a hundred yards you can see the track—the B. & O. track—that is south.

Q. How is that?

A. You can see the B. & O. track south a good piece.

Q. Where is that you can see the B. & O. track?

A. After you turn that corner and go towards the railroad.

By a JUROR: Up on the hill?

A. Yes, sir; you are up on the hill, but about two hundred yards from the railroad, and then you come down to this here grade and you cannot see the track at all. The corn shut off the view and the high bank, besides.

Q. When you get to the top of the last eminence how far is that from the railroad track?

94 A. About 40 or 50 yards.

Q. Go on.

A. Then you come down to the railroad—the horse has to get right down to the railroad and strike within about two feet of the track before you can see south of the railroad a bit. The hill stops you and the bank stops you to see anything until the horse comes right to within two feet of the railroad, and then you can see the south part of the railroad.

Q. You cannot see the track until you come to that point? You mean the track south, I understand.

A. Yes; the track south.

Q. How does Locust Grove crossing—how does the railroad passing Locust Grove crossing, as to being in a cut?

A. There is a big cut there.

Q. How deep is it?

A. About 20 to 25 feet in some places, and some places only 12 or 15.

Q. How wide is the bottom of that cut as it reaches the crossing?

A. 15 feet.

Q. How wide is the roadway between the banks as you come down this hill to the track?

A. 16 feet.

Q. How do you arrive at these distances?

A. By measurement.

Q. Did you observe this locality at the time of this accident or within a few days afterwards?

A. Yes, sir.

Q. Could a person in a buggy, if you travelled along there in a

buggy at that time, about that time, from the top of the hill down the railroad track—can the railroad track be*en* seen southward?

95 A. It cannot be seen at all, sir; even with a man on top of a load of hay could not see it.

Q. Suppose you stand on the railroad track at the crossing, how far southward can you see along the track?

A. About the length of three telegraph poles.

Q. You mean the distance apart of three telegraph poles?

A. Yes, sir.

Q. About how far apart are telegraph poles along there?

A. About 180 feet.

Q. Any of them less than that?

A. Some of them a little less; some may be a little more.

Q. Did you measure the distance from Hog Run railroad bridge to this crossing?

A. Yes, sir.

Q. How far is it from Hog Run railroad bridge to the track-walker's shanty—the tool-house?

A. A little over 800 feet.

Q. How far is it from the track-walker's shanty to the whistling post?

A. A little over 500 feet.

Q. How far is it from the whistling post to the crossing?

A. About, I think, a little over a thousand feet.

Q. How far was it, then, from Hog Run railroad bridge to the crossing?

A. We made it a little over 2,400 feet.

Q. Your daughter living with you at the time of this accident?

A. Yes, sir.

Q. What had been the state of her health before this injury?

96 A. She was the strongest girl I had. She was healthy—always was healthy.

Q. Had you been informed that your daughter was injured, and where did you first see her after she was injured?

A. At Kinney's house.

Q. On what day?

A. The day of the accident.

Q. Had your daughter ever had convulsions or fits before that time?

A. No, sir; always a healthy girl.

Q. How has she been since that?

A. She has been very bad; she has had as many as five, sometimes 3, sometimes one a day. Sometimes she would be a couple of weeks without having any, and sometimes she would have them more severe than others.

Q. If you know, state any predisposing cause for these spasms.

Objection by counsel for def't.

Q. How, if you know, does talking about this accident affect her?

A. It throws her right into convulsions.

Q. Have you ever observed anything that she does about her head when in these convulsions?

A. Yes, sir. She always handles her forehead here, where she was hurt; takes and scratches it and tries to tear it. If she gets her hands loose, the first thing she will do is to grab at her forehead.

Q. How much of a cut was on her forehead—state it in your own language to the jury—when you saw it on the day of the accident?

A. There was about two inches of the cut.

Q. What was the shape of it?

97 A. It was a deep cut.

Q. What was the shape of it?

A. It went kind of sidewise—this way; right about there (indicating on forehead).

No cross-examination.

ALLEN SIKES, being duly sworn, testified as follows:

Direct examination by Judge HUNTER:

Q. What is your business?

A. Baker.

Q. Where do you live, Mr. Sikes?

A. Newark, O.

Q. Keep house?

A. Yes, sir.

Q. Keep house prior to the summer of 1888?

A. Yes, sir.

Q. Are you acquainted with Emma Griffith?

A. Yes, sir.

Q. How are you acquainted with her?

A. She used to work for us.

Q. In what capacity?

A. Doing house-work.

Q. At your residence?

A. Yes, sir.

Q. At what time was she doing work at your residence—doing house-work?

A. About a year ago last December, I think; a year ago last Dec.

98 Q. Dec., 1887?

A. Yes, sir.

Q. What was the condition of her health at that time?

A. Good.

Q. Did she have any convulsions?

A. No, sir.

Q. How was she as to strength and ability to do work?

A. She was a stout, healthy girl.

No cross-examination.

ANNIE GRIFFITH, being duly sworn, testified as follows:

Direct examination by Judge HUNTER:

Q. Are you a sister of the plaintiff?
A. Yes, sir.
Q. You did not see this accident?
A. No, sir.
Q. How soon were you there after it occurred?
A. About 2 hours, I think.
Q. Where at—where did you see her?
A. At Mr. Kinney's, near the crossing.
Q. What was her condition then?
A. It was right after she had gotten hurt.
Q. What was her condition?
A. She was unconscious.
99 Q. How was your sister's health before this injury?
A. Very good.
Q. Was she at any time subject to spasms before this injury occurred?
A. No, sir.
Q. How has she been since?
A. She has been very poorly; subject to spasms very often since.
Q. Have you helped take care of her?
A. Yes, sir; I have taken care of her ever since.
Q. How much trouble is it to take care of her, speaking in a general way?
A. Well, somebody has to watch her all the time. I say we have to have somebody with her all the time and she has these convulsions; we have had to hold her.
Q. How often does she have them?
A. When she was first hurt she had them about one a day; since t at she has had them about every week.

No cross-examination.

By the COURT: Suppose there is any reference made to this injury, what effect does that have upon her?
A. She cannot bear to have it repeated.
Q. I mean with reference to producing convulsions. If anything is said about the injury, does it produce convulsions?
A. Yes, sir.
Q. Suppose she gets excited about anything else?
A. Certain kinds of excitement that affects her.
Q. What I want to know is whether it is excitement regarding the accident only that produces convulsions.
A. No, sir.
100 Q. Excitement about everything?
A. Excitement about everything.

Dr. LECRONE, being duly sworn, testified as follows:

Direct examination by Judge HUNTER:

Q. Are you a physician and surgeon?
A. Yes, sir.
Q. How long?
A. 24 years, I believe.
Q. Where do you live?
A. Hebron, Licking Co.
Q. Are you acquainted with Emma Griffith?
A. Yes, sir.
Q. Acquainted with her father, Ebenezer Griffith, and his family?
A. Yes, sir.
Q. What position did you occupy as to the family prior to this accident?
A. I was their family physician.
Q. How long had you been so?
A. 8 or 10 years; I don't just remember the number of years.
Q. What sort of general health did Emma Griffith have before this injury?
A. Good.
Q. State to the jury whether she was subject to spasms or convulsions before that time.
101 A. No, sir.
Q. How has her health been since?
A. Very poor.
Q. What is wrong with her health?
A. She has convulsions such as she had here today.
Q. Dr., state to the jury if there is any connection between this concussion—between these convulsions and that injury; and, if so, state what it is.
A. Of course, there are a great many causes for convulsions. In this case my opinion is that it is from the injury she received at this accident. The exact condition of the brain and the nerve cells may be affected—might be due to pressure upon the inner table of the skull upon the brain, or might be from injury to some of the nerve centers, ophthalmy or something of that kind.
Q. Dr., do you know about how often she has these convulsions?
A. I don't know since they left the country and moved to Newark. While I was treating her she had probably one or two a week, I would think.
Q. What is your opinion as to the probable termination of that injury?
A. I do not think she will ever be any better. She looks a great deal worse to me now than she did when I saw her last.

Cross-examination by Col. KIBLER:

Q. Did you ever consider or try to find out whether there was any pres-ure on the brain?

A. I did not treat her for 3 or 4 weeks after she received
102 the injury. I made, of course, an examination, and could not, of course, examine the bone so well after that.

Q. Are these convulsions she has now—are they indicative of any pressure upon the brain, of any piece of bone or anything of that sort?

A. Yes, sir.

Q. Did you ever know of convulsions of the description you have stated to be produced by anything else than pressure upon the brain?

A. Oh, yes; the same kind of convulsions might have originated from various causes.

Q. Having heard that there was an injury across the forehead——

A. I know that there was.

Q. Would not your opinion now, as a physician, be that the cause of these convulsions is the pressure on the brain from that bone?

A. It might be.

Q. And would not that be the natural conclusion?

A. I could not tell positively.

Q. Suppose it were, then what would be the remedy?

A. Trephining.

A. And that is possible yet?

A. Possible; yes.

Q. And if there were any pressure upon the brain of that kind and it was removed the health would get better and the convulsions cease?

A. If that alone was the trouble.

Redirect examination by Judge HUNTER:

Q. Is not that operation attended with a great deal of dif-
103 ficulty and danger?

A. Yes, sir.

Q. From your experience, about how many cases of trephining reach a successful termination and restore the health of the patient?

A. I do not know that I can say, exactly; but a small per cent.

Q. And if it fails what is the result to the patient? Suppose the operation of trephining does not work out successfully, what becomes of the patient?

A. Well, it would be injurious to the patient if it was not a successful operation.

Q. It is a pretty expensive operation, is it not?

A. Pretty expensive.

Q. It is a fact that only certain surgeons in your profession attempt it?

A. Very few.

Dr. LATTIMERE, being duly sworn according to law, testified as follows:

Direct examination by Judge HUNTER:

Q. Are you acquainted with the plaintiff, Emma Griffith?
A. I am.
Q. What is your profession?
A. Physician and surgeon.
Q. How long have you been so?
A. Between 10 and 12 years.
Q. Are you attending the plaintiff now?
104 A. Yes, sir.
Q. What is the matter with her?
A. She has convulsions and a broken-down, nervous system.
Q. Do you know the cause of these convulsions; do you know what causes her condition? Suppose she was injured by being struck by a railroad train or injured in a collision with a railroad train on the first of August, 1888—made unconscious—and received a wound the scars of which you can still see. Now, what, in your opinion, causes this condition of her system?
A. I think the wound causes it.
Q. How did the wound cause it, in your opinion?
A. That is a hard matter to decide. It may be due to the former fracture of the inner table of the skull, causing pressure upon the brain, or when she gets excited there is an increased flow of blood to the brain, which increases the pressure, or it may be due to nervous changes produced by the shock. There are a great many causes that might have produced that.
Q. Have you obs-rved as to whether she makes any motion about the wound when she is in convulsions?
A. Yes, sir.
Q. What have you to say about that?
A. Well, I hardly know what to say. I have noticed this, that when I press on the scar, if I use a very slight pressure on the scar, I increase the convulsions always.
Q. What is your opinion as to when in these convulsions she puts her hand up and rubs around about the place of the scar?
A. It would indicate that there was some trouble there—some irritation of the brain in that region.

105 Cross-examination by Col. KIBLER:

Q. What is your opinion, as a physician, as to whether from what you state is the effect of the increased pressure upon that part when she has a convulsion increasing them, whether or not there is a pressure on the brain by some substance or bone?
A. That would indicate that there is some pressure there; that the wound has not been healed from the inner table, provided there is a fracture. That is a question *is* is impossible to answer positively.
Q. Impossible to answer; but the increased pressure on the spot increases the convulsions?

A. That shows plainly that the wound has not thoroughly healed.

Q. Why has it not healed?

A. I don't know.

Q. Your skill as a physician does not enable you to answer that?

A. No, sir.

Q. What would be the remedy, suppose you would come to the conclusion that there was something there?

A. My opinion is that in the first place the remedy should have trephining.

Q. When would have been the proper time for that operation?

A. Right at the beginning.

Q. That could be done at any time?

A. It could be done now.

Q. That is just cutting around and taking out a piece of the skull, is it not?

A. Yes, and seeing if there is any pressure on the brain tissue.

By the COURT: Does it not happen sometimes that when there is a concussion of that kind that there is something like
106 when you drive a nail almost through a board; on the inside there is a piece lifted up, not detached from the board, but just lifted up on the inside?

A. Yes, sir.

Q. Then that sensitiveness and the increase of the convulsion indicates that that is the spot, does it not?

A. Yes, sir.

By Col. KIBLER: Is there not particular danger about that operation of trephining at this part?

A. Yes, sir; there is danger there, for the simple reason that it may light up meningitis—that is, inflammation of the membrane surrounding the brain—and the longer that is put off after the injury the more danger there is.

Q. Did you ever notice that this plaintiff's memory was affected?

A. Yes, sir; her memory is affected at all times.

Q. Did you know her before the accident?

A. I was not acquainted with her. I knew part of the family.

Q. Supposing that her memory was good before the accident and bad afterwards, would that give you any means of determining what was the cause?

A. We would naturally suppose that it was the accident that caused it, or the shock to the nervous system.

Q. Would that indicate that it was the shock to the nervous system or the local pressure here?

A. It might be either.

107 Dr. LECRONE recalled:

By Judge HUNTER: Have you noticed Emma Griffith at the time of convulsions putting her hand where the wound was?

A. Yes, sir.

Q. What is your professional opinion as to any connection between that and the location of the cause of the convulsion?

A. It would indicate that the trouble was there.

By the COURT: Dr., will you please state whether there was any indication of a fracture?

A. I think there was some.

JOHN STEDMAN, being duly sworn, testified as follows:

Direct examination by Judge HUNTER:

Q. Where do you live?

A. Locust Grove. I live about a quarter of a mile west of the station.

Q. Are you acquainted with Locust Grove crossing and its surroundings?

A. Yes, sir.

Q. State to the jury whether the railroad at Locust Grove crossing passes through a cut or not.

A. Yes, sir; it passes through a cut.

Q. How deep is the cut?

A. Do you mean the railroad cut?

Q. The railroad cut.

A. I should judge it about fifteen feet; somewheres near that.

Q. Is this cut right at the crossing?

A. Yes, sir.

108 Q. Now state to the jury how the county road approaches that crossing.

A. Coming down from the west?

Q. Coming from the west.

A. Coming west it comes down, gradually down, from the top of the hill until you come down to the railroad. I should judge that the grade there is about three degrees.

Q. Is there any cut in the county road as it comes down to the crossing?

A. Yes, sir; that is what I had reference to. That is the grade there. The county-road grade is what I had reference to when I was speaking about the grade.

Q. How wide is the roadway of this county road as it comes down this little hill to the rails?

A. Do you want me to give the full dimensions or the part they can travel?

Q. The part that you can travel.

A. The part of the road where it can be travelled down next to the railroad it is about fifteen feet; somewheres near that. Of course it widens as it goes back further on account of the crossing.

Q. Did you ever travel along there in a buggy?

A. Yes, sir.

Q. What opportunity is there for a person coming down that little grade on the county road and the tracks to see a train coming from the south, supposing it is in August and the corn-field is there?

A. There is no opportunity to see the train. There was not at that time.

109 Q. Do you remember when this thing occurred?

A. Yes, sir.

Q. Were you on the ground shortly after that?

A. I was on that ground that evening about half past seven and I saw the horse lying along the track.

Q. How far from the crossing?

A. I should judge about fifty feet.

Q. How wide is the bottom of the railroad there—that is, before the banks go out on each side, making the cut?

A. About 20 feet.

Q. Say that a person is going west across that track, how near going down the hill—how near would they have to get to the iron rail before they could see along the track south?

A. I should judge ten feet. You would have to go back before you can see it.

Q. Suppose you stand by the side of the track there or on the track, do you know whether there is a curve right south of the crossing on the railroad?

A. Yes, sir. I think the curve begins right near the crossing.

Q. Standing at the railroad track or on the crossing looking southward, how far can you see the track?

A. I should judge about five hundred feet.

Cross-examination by Col. KIBLER:

Q. Is that considerable of a curve there?

A. Well, it is not what we would call a very large curve.

Q. What degree is it? You mention the degree of the road.

A. Well, I suppose it is about four degrees; somewhere near that.

110 Q. Are you familiar with this matter of degrees as to grades and curves?

A. Yes, sir; to some extent.

Q. Did you ever try to see how far down the track you can observe——

A. Yes, sir; stopped there quite often.

Q. After coming down to the level track?

A. Yes, sir.

Q. You say within ten feet away you can see some distance?

A. You can see about 500 feet, looking down the track.

Q. I am asking you how far you can see at that point, ten feet away from the track.

A. I do not suppose you could see a train more than two hundred feet away.

Q. What is the reason?

A. On account of the bank.

Q. Which way does it curve, to the west or to the east?

A. It curves, going south, to the west—or east; the east.

Q. What point of the hill is in the way to see when you get within ten feet of the track?

A. On the west side of the track.

Q. Although the curve goes to the east, there is some obstruction in the way looking from the west side of the track?

A. Yes, sir; there is a bank there.

Q. How far is it back from the railroad track to the top of the hill of three degrees?

A. It is about 200 feet, I should judge.

Q. Now, from the top of that can you see south?

A. No, sir; not when there is corn there you could not.

111 Q. You saw that corn-field that time, did you?

A. Yes, sir; I was there that evening.

Q. How high was that corn?

A. I should judge about ten feet.

Q. Suppose you go a little further west, about 245 or fifty feet from the railroad track, can you see the railroad track?

A. No, sir.

Q. You tested that, too, did you?

A. Yes, sir.

Q. What is the grade of the road there from the top of that hill, the highway, I mean?

A. There is a bend there, coming down to the railroad, and the dirt has been scattered back; there has been a bend there and the bend has been filled up, and the road is about level there until you get back, I suppose, to the top of the hill—back, I suppose, to the turn of the road—and the turn of the road, I suppose, is about three or four hundred feet from the railroad track.

Q. From that point can you see the railroad track?

A. No, sir.

Q. Where can you see it?

A. Then the road turns southwest and comes down the hill, and you cannot see anything there.

Q. Can you see the railroad track after crossing the Hog Run bridge on that road?

A. Yes, sir; I should judge about a hundred—hundred and fifty feet from Hog Run county bridge.

112 FRANK LEWIS, being duly sworn, testified as follows:

Direct examination by Judge HUNTER:

Q. Where did you live in 1888—in the summer?

A. About 5 miles south of Newark.

Q. How near to Locust Grove crossing?

A. About ½ mile.

Q. In sight of it?

A. Yes, sir.

Q. Are you acquainted with Locust Grove crossing and its surroundings at that time?

A. Yes, sir.

Q. Does the railroad run through a cut there?

A. Yes, sir.

Q. How deep is the cut?

A. I should judge from 15 to 18 feet.

Q. How does the road run down there from the little hill that

comes down to the track? How does that road come down to the track? Is there any grading there?

A. Yes, sir.

Q. The county road I am speaking of.

A. Yes, sir.

Q. How far is the top of this last grade from the iron rails; do you know?

A. No; I do not know.

Q. Is there a curve at the railroad just south of Locust Grove crossing?

A. Yes, sir.

Q. How much of a curve is it?

113 A. Well, I could not say as to the distance.

Q. Suppose you stand on the railroad tracks, between the rails, looking south, how far can you see the track?

A. About 300 feet.

Q. Now, Mr. Lewis, is there any part—or did you travel along there in a buggy about that time?

A. Yes, sir.

Q. Do you remember the corn-field?

A. Yes, sir.

Q. How high was the corn?

A. I should judge about 10 feet high.

Q. Where was the fence from the top of the hill down to the railroad track—on top of the bank or down by the roadway?

A. On top of the bank.

Q. How was it as to bushes alongside the county road then—along the fence—if you remember?

A. I don't remember, but I think the fence was clear.

Q. Could a person on top of that last hill, before you come down to the track, in a buggy, see the track?

A. No sir.

Q. Is there any opportunity of seeing the railroad track, driving down from there to the railroad track? Is there any opportunity of seeing the railroad track until you get to the track?

A. No, sir; until you get right to the railroad board fence.

Q. How far is that from the iron rail?

A. About 27 feet.

Q. How near do you have to get to the iron rail to see along the track at all?

114 A. Well, you can see just as you pass that board fence, and that is about twenty-seven feet.

Q. How wide is the railroad cut at the bottom?

A. About 20 feet.

Q. Is that where the bank commences sloping up?

A. Yes, sir.

Q. How far apart are these banks of the railroad track constituting the cut?

A. About 100 feet, I should judge.

Q. Do you mean at the top?

A. Yes, sir.

Q. 20 feet at the bottom?
A. Yes, sir. Maybe it is a little more than 20 feet.

X-examination by Judge COLLINS:

Q. You say that you can see up the railroad track just after passing that board fence that is at the cattle-guards?
A. Yes, sir.
Q. And that is 20 feet back from the rails?
A. About 27 feet from the rails.
—. ——.
A. Yes, sir.
Q. This train was coming from the south?
A. Yes, sir.
Q. And you say you could see three hundred feet at a point 27 f't back?
A. Yes, sir.
Q. Do you remember this accident?
A. Yes, sir.
Q. Where were you at the time?
115 A. I was at home.
Q. How far is your home from the crossing?
A. About ½ mile.
Q. What direction?
A. East.
Q. Right directly east?
A. Yes, sir.
Q. ½ mile from Hog Run bridge on the railroad?
A. Yes, sir.
Q. Did you hear the whistle of that train on that day?
A. Yes, sir.
Q. Hear it whistle at Hog Run bridge?
A. Yes, sir.
Q. How loud was it?
A. About as loud as common.
Q. It was a common whistle?
A. Yes, sir.
Q. How much further could it have been heard than half a mile?

Objection by counsel for plaintiff.

Redirect examination by Judge HUNTER:

Q. Were you looking at the train, Frank?
A. Yes, sir.
Q. Did you hear it whistle?
A. Yes, sir.
Q. Did you hear the bell ring?
A. No; don't remember of hearing the bell ring.
Q. You looked at the train as it ran in?
A. I just merely noticed it.
Q. That train marked your dinner time, didn't it, out there?
A. Yes, sir.

116 Q. And didn't you notice it on that account?
A. Yes, sir.
Q. And you don't remember of hearing the bell ring?
A. No; I don't remember of it.

Plaintiff rests.

117 *Defendant's Testimony.*

W. A. SMITH, being duly sworn, testified as follows:

Direct examination by Col. KIBLER:

Q. What is your business?
A. I am civil engineer.
Q. In the employ of the Baltimore and Ohio Railroad Co.?
A. Yes, sir.
Q. Did you at any time make a survey of this Locust Grove road crossing and the surroundings of it?
A. Yes, sir.
Q. When was that?
A. That was in 1888.
Q. Do you remember what time in 1888?
A. Generally put it on that plat. I can refresh my mind by looking at the date on the plat.
Q. What date?
A. The last of August, 1888.
Q. Did you make any plat of your observations that day?
A. I did.
Q. Is that one of them?
A. Yes, sir.
Q. I will ask you first what is the width of the railroad track there on the bottom?
A. About 20 feet.

Q. What is the width of the whole right of way as may be
118 indicated by pencil?

Objection.

Q. How far were the fences on the south side of that highway crossing?
A. The right of way at that point——

Objection.

COURT: I do not see why he may not prove the lay of the ground and the surroundings there. Of course it does not make any difference about the width of the right of way, but so far as it is necessary to explain the lay of the ground—the thing to be found out is what was the opportunity of a person riding in a buggy there to see in the direction in which the train was coming and whatever tends to throw light upon that is competent.

Q. How far apart are the fences there just at the road crossing?
A. The fences are about 33 feet each side of the center of the track.

Jury permitted to examine plat.

Q. Indicate the points on that map.

A. The top of the map is north, the bottom south, right hand is east, and the left hand is west.

Q. Do you remember the slope of the banks just south of the road crossing—the highway crossing?

A. Yes, sir; I measured the height of the bank from the hollow.

Q. How high is it?

A. It is nine feet on the south; the west side of the railroad at the highest point is nine feet high—the ground is. The highest point of the cut that the railroad comes through on the west side of the railroad south of the crossing where the accident occurred.

119 Q. I will ask you if you observed on the highway at what distance you could see looking south?

A. Yes, sir.

Q. What was it?

A. At a point 24 feet west of the crossing an engine can be seen for eleven hundred feet down the track. I measured the distance.

Q. Looking south?

A. Looking southward along the track.

Q. Do you know the distance from that crossing down to the whistling post?

A. Yes, sir.

Q. Please state it.

A. Ten hundred and fifty-seven feet from the crossing to the whistling post.

Q. How far is it from the crossing to the shanty?

A. Fifteen hundred and sixty-five feet.

Q. From the crossing to the Hog Run bridge?

A. From the Hog Run bridge to the shanty is 724 feet; it would be the sum of 1,565 and 724 feet.

Q. Did you come along this highway at that time?

A. I did, sir.

Q. West of the railroad track?

A. Yes, sir.

Q. I will ask you whether at the time you were there there was corn in the fields?

A. Yes, sir.

Q. I will ask you now whether at any point on the highway west of the railroad track you could see a train or could have seen

120 a locomotive?

A. Yes, sir.

Q. Where was that point?

A. At a point in the county road 245 feet from the track an engine could have been seen for three-quarters of a mile over the top of the corn.

Q. Did you test that that day?

A. Yes, sir; the same train came up.

Q. Were you standing there when the same train came up?

A. Yes, sir.

Q. At any other point on the county road west of that did you make any test?

A. I went along the road at various points before the train came, but stood at this low place, 245 feet west of the crossing, at the time the train went along. I should judge from the nature of the ground that for some little distance towards the track from the Hog Run county bridge that the train could have been seen, and then there came a small eminence which on account of the corn would prevent them from seeing the train until they reach a point where the low ground or swamp would be to the right of them, and then for a couple of hundred feet they could see the train; could have seen it.

Q. How far did you say that was from the railroad track?

A. 245 feet westwardly on the county road from the railroad track.

Q. According to the map, point 2, how far is that from the railroad track?

A. 150 feet from the track.

Q. Is that the one you first mentioned as being able to see above the corn?

A. It is not the one I have been speaking about. The
121 point 245 feet is the one where I said I saw the train coming in.

Q. Point No. 2 is 150 feet?

A. Yes, sir.

Q. A train could have been seen from that point?

A. Well, that is the highest point. I do not know the different points where the train could have been seen, because of it being impossible for me to be in more than one place at one time; before you reached the track until you come within 24 feet of the track; then you could see the track.

By Judge HUNTER: From this point marked 2, you could not see the track from that until you came down to 24 feet of the track?

A. Could not on account of the height of the corn and the height of the ground.

By Col. KIBLER: I see a mark here, 4. What have you to say about that?

A. That swamp marked 4 on the plat is five and one-half feet lower than the road where the road passes along the swamp at 3 marked on the plat.

Q. What do you mean by 8 on the plat?

A. 8 represents a tree.

Q. What have you to say about that, Mr. Smith?

A. Standing at the place I stood, opposite the swamp you can see a train until it passes to the tree in the direction of the crossing.

Q. Train going north?

A. A train going north until it reaches a point about the tree.

Q. Then south of that could you see the track?

A. Could not see the track, but could see a train.

Q. State what you have to say about the accuracy of this plat.

122 A. This plat is drawn to a scale and represents a portion—represents the vicinity of the crossing. It does not reach as far as Hog Run bridge, which is too far down.

By a JUROR: Is that a correct curve?

A. It is; that is about a two-degree curve. I tested the curve.

By Col. KIBLER: Beginning south of the crossing?

A. Beginning about at the south of the crossing curves towards the east and southerly from the crossing.

Q. What do you say the scale of the map is?

A. I do not see the scale on here: could not tell unless I had a scale to scale it, but it is drawn to scale. I generally put the scale on the map, but in this case it has been omitted.

Map offered in evidence.

Cross-examination by Judge HUNTER:

Q. This road runs down in this direction?

A. Yes, sir.

Q. Hog Run flows around in this way?

A. Yes, sir.

Q. And right here is the county bridge?

A. Yes, sir.

Q. After crossing the county bridge you can see the railroad track looking across that way?

A. Yes, sir.

Q. See Hog Run railroad bridge?

A. Yes, sir.

Q. See it for quite a distance along the county road?

A. The ground is low.

123 Q. Flat?

A. Yes; and the railroad is on a little embankment there.

Q. Then you come along here and you come to a little hill running this way and then you come down to that flat place and then up another little hill and then down to the track?

A. Yes, sir.

Q. Here is a hill and here is a flat and then here is a hill where you come down to the track?

A. Yes, sir.

Q. You can see the railroad when you are on the county road here?

A. Yes, sir.

Q. And then when you come to this low place you can again see the track?

A. Yes, sir.

Q. And then you approach the track and this point of the hill here commences to obstruct the view, and the further you get up until you get to the top of the grade then the view is entirely obstructed, and you say that point there is 150 feet from the rails?

A. Yes, sir.

Q. Now, here at that time was a corn-field and the corn was ten or 12 feet high, and there is a cut here on the county road which you have indicated, grading it down with a bank on each side of the roadway. On the top of the bank there is a rail fence; inside the rail fence is the corn. Did you notice any bushes along there besides?

124 A. The bushes were lower than the corn, if there were any bushes. There was no large trees or bushes, anyhow.

Q. When you were driving down there you would be lower than the top of the fence?

A. Lower than the corn and the fence. The point at 2 is six feet higher than the point at the crossing, and it begins here gradually to slope to the crossing.

Q. Up at the top here: but this ground here don't slope any from here to there?

A. The natural ground does not, but the road——

Q. It is level right along to the railroad, and the railroad has a cut through the hill, and the county road from here across the track is lower, cut through the hill, and the crossing is in a cut in every direction. Well, now, right here you could not see the railroad track on account of the corn, the obstructions that were there; as you come nearer the track the obstruction is still higher, and you say it keeps on until you come within—there is no view of the track, except looking across the crossing, until you come within 24 feet of the rail and then there is a view along the track?

A. Yes, sir.

Q. You say from this point to this point is 20 feet. That is the bottom of the slope?

A. About 20 feet; it varies slightly.

Q. Now, ain't it about 16; did you actually measure that?

A. I measured it.

Q. From the bottom of the slope to the bottom of the slope, ain't it 16 feet?

A. No, sir; I measured it 20 feet. There may be places where it is 16.

125 Q. But I mean right at the crossing. Don't the grading of this road keep right on until you come right down to the rail—to within a few feet of the rail?

A. Gradually descending grade from the highest point to the rail.

Q. No flat places here?

A. The flat place is right at the crossing.

Q. And right between the rails?

A. Yes, sir.

Q. This shading here, representing the bank—that slopes up what degree of slope?

A. About 45 degrees.

Q. Just about as much of a slope as the ground will stick at.

A. One and one-half to one we call it.

Q. There is no chance to see that track until you pass this obstruction, and that, you say, is 24 feet from that rail?

A. Yes, sir.

Q. Is it not a fact that you can stand on that track and not see along that track more than 450 feet?

A. No, sir.

Q. Do you say that is not so?

A. Yes, sir.

Q. That on account of the curve taking the track clear out of your view, and does not this track commence to curve, so that after it goes 450 feet it is entirely out of view?

A. A person standing on the track—it would be about six hundred feet.

126 Q. If a person standing can see along the track from that point—24 feet from the rail—can see an engine eleven hundred feet away out here, then a person on the engine could see anybody at that point the same distance, couldn't they?

A. If he was on the west side of the engine he could, but if he was on the other side he could not.

Q. If he was on the west side of the engine—you can see just as far from that point to this one, as from this point to that?

A. If he was on the west side of the engine.

Q. And it is just as possible to see around a curve looking one way as the other. Isn't it a fact that an engineer approaching that crossing can see that crossing?

A. There is a high bank down here which intercepts the engineer's view coming from the south.

Q. How far does that extend along?

A. From there to there.

Q. How far? Give us your judgment.

A. I should say about 500 feet.

Q. What is to hinder that engineer from seeing, if he is on the track, if it is a straight track? That bank would not be in his road.

A. He is on the curve; and, in the next place, he would have to see around the front of the engine; that would intercept his sight.

Q. Can he not look out of the front part of the cab?

127 A. In the summer they lean out——

Q. These windows in the front of the cab——

A. You can see through them.

Q. Whether they are closed or not?

A. Could if you would look through them.

Q. If an engineer is coming along there and can see ahead of him can he not see through these windows in the front of the cab; ain't that what the windows are for?

A. Yes.

Q. And if an engine didn't have facilities for looking ahead it would not be constructed right?

A. No, sir.

By the COURT: Which side is the engineer's side of the cab?

A. On the right-hand side.

Q. That would be the east side?

A. Yes; sir.

By Judge HUNTER: Did you take a position on the middle of that track to see how far you could see?

A. Yes; I did not measure that distance.

Q. Could you see more than 3 telegraph poles before the curve took it clear out of sight?

A. I should say it was about 600 feet. I do not know the width the telegraph poles are.

Q. Could a person up in the cab of the engine, which is six or 8 feet—5 or 6 feet—above the surface of the track—could he see further than a person standing on the track?

A. I would rather you would ask the engineer who is on this case, because he is more familiar than I am. It is very rarely I ride on an engine. I would only judge of it the same as you would.

128 JOHN A. RYAN, being duly sworn, testified as follows:

Direct examination by Col. KIBLER:

Q. What is your business?

A. Locomotive engineer.

Q. What was it on August 1st, 1888?

A. Loco. engineer—passenger engine.

Q. Were you the engineer on this train on Aug. 1, 1888?

A. Yes, sir.

Q. I would like to ask you how long you have been an engineer.

A. Over 23 years.

Q. I will ask you whether in approaching this crossing—you know where it is, this Locust Grove crossing.

A. Yes, sir.

Q. Where you whistled, if you whistled at all.

A. I whistled as I was coming to the watch shanty that is near the whistling post.

Q. You mean you whistled on that day?

A. Yes, sir.

Q. Where is the watch shanty with reference to the whistling post?

A. The watch shanty is a little south of the whistling post; don't know just how far.

Q. What kind of a whistle did you give?

A. Long whistle; same as given for approaching any regular station.

Q. About how long was that whistle?

A. They are calculated to be about five seconds.

Q. I will ask you whether the bell was rung.

A. Yes, sir.

129 A. Yes, sir.

Q. Whose business was it to ring it?

A. The fireman's business, when not employed.

Q. He was ringing it at this time. How long did he continue to ring it?

A. From the time I whistled until after I had passed on my way to the second road crossing or past the second road crossing.

Q. That is after you passed Locust Grove crossing. How long after that did he ring it?

A. There is another crossing—I don't know how many feet it is to the second crossing—north of Kinney's.

Q. Where is the position of the engineer?

A. Right-hand side of the engine.

Q. Where is the position of the fireman?

A. Left-hand side.

Q. At or before crossing the Locust Grove crossing did you see anything on the track or at the side of the track?

A. No, sir.

Q. Did you know of this collision?

A. No, sir.

Q. State whether at this time you were looking out as usual.

A. Yes, sir.

Q. When, if at all, did you hear or were you notified or informed that there had been any collision?

A. Not until after I had passed quite near the second road crossing.

Q. Who told you?

A. The fireman.

Q. Did you stop?

A. No, sir; we did not stop.

130 Q. Why didn't you?

A. There was a freight train following *us*; pulled out of national road after us.

Q. Was that your reason for not stopping?

A. Yes, sir; for fear something might come down there and something happen to the train—to the brakes or something, and that something might happen.

COUNSEL FOR PLAINTIFF: I do not know that that is competent.

COURT: It is competent.

Q. Do you understand that if in your position on the engine you had seen when you were three hundred feet south of this crossing—that is, south of the road crossing—you had seen a horse and wagon coming down the hill from the west, could you have stopped in that distance?

A. No, sir.

Q. From what point could you see this road crossing, coming north?

A. Well, I don't know how far it would be; of course I never measured it. It was not but a very short distance. I could see anything on it without their getting on to the track. I don't know just exactly the distance.

Q. Who was your fireman?

A. W. R. Stone.

Q. How long was he engaged in that business; do you know?

A. Well, about 7 or 8 years, I believe, on that division down there.

Q. What kind of a man is he as to being attentive or not to his duty?

Objection by counsel for plaint-ff.

COURT: You can prove his experience as fireman; can prove whether he was competent.

131 Q. Well, what do you say as to whether or not he was a competent fireman?

A. He is.

Cross-examination by Judge HUNTER:

Q. Are you in the employ of the B. & O. Co.?

A. Yes, sir.

Q. Did you get a subpœna in this case?

A. Yes, sir—well, hold on; I was notified.

Q. Were you not notified simply by the officers of the company to come here and testify?

A. Yes, sir; that was it. From the proper officer, I suppose, I got notice.

Q. You were passed up here without paying fare from Newark on the B. & O. railroad?

A. Yes, sir.

Q. Mr. Ryan, you are familiar with this crossing, are you not—very familiar with it?

A. Yes, sir; I am.

Q. How long had you been engineer on this train running on that division?

A. Let us see. About two years—something in that neighborhood.

Q. How long before the collision?

A. About 2 years on that run before that; a little over two years.

Q. Did you pass that crossing twice every day during that time excepting Sunday?

A. Excepting when the engine was not in the shop or days that I should lay off.

Q. The railroad runs through a cut at that crossing, does

132 it not?

A. Yes, sir.

Q. Isn't that a pretty dangerous crossing, Mr. Ryan?

A. Well, in one sense of the word, you may say it is dangerous.

Q. Is not the surrounding—running through a cut and the road coming down through a cut—are those not elements of danger?

COURT: I do not think that is a proper question.

Question withdrawn.

Q. Right south of this crossing—immediately south of it—does not the railroad curve very decidedly?

A. After leaving the crossing it starts on a curve.
Q. That is southward?
A. Yes, sir.
Q. Mr. Ryan, is not that curve such that you cannot see the crossing more than 300 feet coming from the south?
A. As I said before, I never measured it and cannot tell you.
Q. Give us your judgment.
A. I don't know how to render judgment in the case, because I would not like to commit myself one way or the other.
Q. You were coming along there on this train that did the injury; you were on the right side of the cab?
A. Yes, sir.
Q. Were you on the right side of the cab when you approached this crossing on this occasion?
A. Yes, sir.
Q. Where were you looking when you approached this crossing?
A. Where I am calculated to look—straight ahead for any danger—looking straight ahead.
Q. You could see straight ahead, could you?
A. Well, I was endeavoring to.
133 Q. Well, could you? Was there a window in the front part of your cab that you could look out of?
A. Yes, sir.
Q. Were you looking through that window?
A. Yes, sir.
Q. The front window of the cab?
A. The front door of the cab; yes.
Q. If anything had been on the crossing could you have seen it?
A. I might have seen it if it had been on the crossing.
Q. As you approached the crossing could you have seen it after you began looking?
A. I was looking straight ahead. I was looking for the signal from the station.
Q. Had anything been on the crossing at the time you were looking could you have seen it?
A. Yes, sir.
Q. Was there anything on the crossing?
A. No, sir.
Q. Anything near the crossing?
A. Not that I seen.
Q. Were you looking as the engine came up to the crossing?
A. I was. I stated in my answer that I was looking straight ahead.
Q. When you got up to the crossing?
A. Yes, sir.
Q. You didn't see anything?
A. No, sir.
Q. You had your deposition taken, didn't you, about this injury?
A. Yes, sir.

134 Q. Didn't you state in your deposition that you were looking across the curve?

A. Just across the point of the curve there.

Q. Didn't you state in your deposition that you were looking straight ahead and looking across the curve from where the engine was approaching the crossing and Locust Grove station?

A. That is the answer. I will tell you, Judge, I was looking right straight ahead. My answer is correct in that. I was looking right square straight across the point of the curve looking across to Locust Grove.

Q. Now, suppose that is the way you were coming around the curve to the crossing and here is Locust Grove station; you were looking across the curve in that direction to see what was at the station, were you not?

A. The distance is not but very, very short from where I was looking to the cattle-guard, and a man with any ordinary eyesight could have seen it, and I consider my eyesight very good.

Q. You saw nothing come on there?

A. I seen nothing.

Q. If anything had been coming on there you would have seen it, would you?

A. Yes, sir.

Q. If any horse and buggy had got on there you could have seen it——

A. If any horse and buggy had been out in front of the engine I would have seen it go onto the track.

Q. Didn't you testify this way in that deposition—wasn't this question asked you: "What were you doing when you ap-
135 proached the crossing?" and didn't you say, "I was looking ahead for a signal for some one to get on at Locust Grove station"?

A. I was looking for a signal; yes, sir.

Q. Then wer'n't you asked, "Could you see the station before reaching the crossing?" and didn't you answer, "I was looking across the curve; I cannot say what distance"? Didn't you say you were looking across the curve?

A. That corresponds with the answer I make you now.

Q. How could you have been looking across the curve when you were looking along the track in front of you?

A. Looking across this point here does not take you very far from the crossing.

Q. Didn't you say there was a little depression there, through the cut through which the train was running, and that you could see across to the station?

A. The cut is not so high on the east side as it is on the west.

Q. Well, didn't you say that, Mr. Ryan, in your deposition?

A. There is a little depression; yes, sir.

Q. And you could look across the curve and see the station?

A. Yes, sir.

Q. And you could not see the station looking straight along the track?

A. Not on that side of it.

Q. Didn't you state in your examination, in your deposition, to this question, "How close must you be to the crossing, coming from the south, before you can see the crossing?" and didn't you say, "A short distance; don't know exactly"?

A. I have answered the question. I do not know exactly; I never measured it.

136 Q. What rate of speed were you going, Mr. Ryan?

A. About 45 miles an hour, as near as I could judge it.

Q. Were you behind time?

A. Yes, sir.

Q. That was more than your usual rate of speed, was it not?

A. Well, a little; not much.

Q. In coming down how is the grade as you come down to the Hog Run railroad bridge, coming north on down to the crossing?

A. It is descending grade; don't know just what it is to the mile.

Q. Is it not your custom at that place to shut off steam when you are coming down grade?

COUNSEL FOR DEFENDANT: It don't make any difference what his custom is.

COURT: I don't know about that. It may possibly be a question whether they used the customary cautions on this occasion.

A. If we are on time it is customary to come down there not using steam.

Q. Did you shut off the steam when you were coming down there that time? You didn't need any steam coming down the grade?

A. I was using steam; commenced using steam on the descending grade when I was coming down there.

Q. You had a full head of steam on?

A. No, sir.

Q. Didn't you say in your examination that you shut off the steam, but was using some steam?

A. I was not using a full head of steam.

Q. You were not approaching there under a full head of steam, then?

A. No, sir.

137 Q. You say you sounded the whistle between Hog Run railroad bridge and the shanty?

A. About there.

Q. Approaching the shanty?

A. Yes, sir.

Q. You say you thought there was a train following you; did I understand you to say that?

A. There was one pulled out of national road right after us.

Q. Did you see them pull out?

A. I saw them throw the switch when I left there.

Q. Didn't you see them pull out?

A. No, sir.

Q. You passed that freight train at national road, did you?

A. Yes, sir.

Q. That was about three miles south of Locust Grove crossing?

A. I don't know the distance at all.

Q. And you came on north and you expected the freight train to follow?

A. Yes, sir.

Q. How soon after you left national road crossing did you expect the freight train to follow you?

A. I could not say for that how soon I would expect them to follow.

Q. They didn't have any right to follow you for ten minutes after you left, did they?

A. I think it was seven minutes, then.

Q. Did not the train regulations at that time stipulate that passenger trains could not be followed by anything except ten minutes would intervene?

A. It may be.

Q. Didn't you expect that freight train would obey the regulation and give you ten minutes start?

A. I would naturally expect it would.

Q. Were you over ten minutes getting from national road
138 to Newark?

A. Yes, sir; it was over 10 min.

Q. How far are you from national road to Newark?

A. Seven miles and a half.

Q. Didn't you get into Newark about the time that train started from national road?

A. I don't know anything about that, Judge.

Q. What is the rate of speed allowed a freight train to run on that division. Ain't it 18 miles an hour; ain't that the maximum?

A. That is more than I know; I cannot answer that.

Q. Suppose a freight train is running 18 miles an hour and was following a passenger train going 45 miles an hour, how soon will the freight train catch the passenger train?

COURT: That is a matter of calculation that the jury can make, the court can make, and you can make.

Q. It was not you that rung the bell?

A. The fireman was ringing the bell.

Q. And you were looking ahead?

A. Yes, sir.

Q. Didn't you have your head out of the right-hand side of the cab when you were looking across the curve?

A. No, sir.

Q. And you could see across the curve to the station without looking out of the side of the cab, could you?

A. Yes, sir.

139 Redirect examination by Col. KIBLER:

Q. I will ask you whether, in your judgment, it would have been safe to have stopped that passenger train with a freight train following it.

A. That is the conclusion I came to. We thought that if anything should happen to the brakes they would probably come down there and could not stop and would come into us.

Q. In looking across this curve could you see the track?

A. Yes, sir; I could see the track, as I explained to Mr. Hunter.

Q. And you saw the track at the crossing by looking across that curve?

A. Yes. I will explain that for the benefit of the jury; that there there is a cattle-guard coming down there——

Q. Explain about the cattle-guard.

A. There is a cattle-guard coming down from the east side from the bank; on the east side of the track is a wire with a board going down like that on the top, and I had to look right through that thing to see this little station that I was telling you about, and that does not take my sight away from this track any great distance looking across that point.

Q. You say you had to look through what?

A. This wire cattle-guard. That would not divert my eyesight from the track?

By the COURT: Who rung the bell, did you say?

A. The fireman.

Q. Where was he sitting—by the left-hand side?

A. Left-hand side.

Q. By the left window?

A. Yes, sir.

140 Recross-examination by Judge HUNTER:

Q. Did you say that you could look across the curve and see the crossing, or was it the station you said?

A. Suppose you take a point——

Q. No: I am asking you about what you told Col. Kibler.

A. Looking through this cattle-guard comes right down on the point of the curve.

Q. When you are looking across the curve could you see the station; I mean the crossing—the railroad crossing at Locust Grove?

A. Yes, sir.

Q. How far were you from the crossing when you could see the crossing?

A. I told you I could not tell how far it was.

Q. Well, you say it was a short distance?

A. It was a short distance.

Q. When you were further away than that you could not see the crossing?

A. I stated that I could not tell the distance.

Q. When you get beyond that distance you could not see the crossing, could you?

A. What do you mean?

Q. The distance that you say you could see the crossing.

A. I have explained it as satisfactory as I can.

Q. There is a certain point that you say you could see the crossing as you approach it; could you see the crossing before you reached that point?

A. I think I have explained as near as I can.

Q. Well, you could not see the crossing at all until you
141 came within a short distance of it, and you cannot tell exactly what the distance was?

A. I told you that——

Judge COLLINS: The point that Mr. Hunter is driving at is, could you have seen the crossing before you came in sight of it?

Q. When you say you could see the crossing looking through the wire you must then have been within sight of the crossing?

A. Yes, sir.

Q. And didn't you say that you could see the station looking across the curve?

A. Yes, sir.

Q. How far does that cut extend that the railroad runs through?

A. I don't know.

Q. Does not the slope of the embankment coming down there cause a bank on each side?

A. It does on the left side.

Q. Is it not a fact that there is nothing between the track but the simple ditch and then the slope commences?

A. On which side?

Q. West side.

A. Yes, sir.

Q. And isn't that embankment as steep as it will stay there, the embankment of the railroad; the slope of the cut is as steep as it will—as the ground will stay there?

A. About that way.

Q. Now, did you mean to stop at Locust Grove station had there been passengers there?

142 A. Yes, sir; I would have stopped there.

Q. Then what would have become of the freight train? If it was dangerous to stop at the crossing it would have been dangerous then.

A. It would have been dangerous then.

Q. And this station is about five hundred feet from the crossing, is it not?

A. I don't know the distance.

Q. It would not have been more dangerous to stop at the crossing than at the station?

A. Yes, sir; a good deal more.

Q. Well, to stop at the station it would not have been more dangerous than to stop at the station on account of these passengers than to stop to pick up passengers, and were not you looking out for passengers when you were looking across to the station for a signal to stop.

A. Well, I think in the deposition I answered you before.

Q. Well, did you use the same language?

A. Yes, sir.

By Judge COLLINS: I will ask you if the rules require all trains to approach stations carefully and they do not apply to crossings?

A. No.

By Judge HUNTER: Is it not a rule that a passenger train will run according to the schedule time, and that if they do delay and have to increase their speed it must be done moderately? Ain't that the rule, that when for any reason you get your speed above the schedule rate arn't you limited to a moderate in-

143 crease?

A. We can run up to—we are allowed a minute and a half to the mile.

Q. Isn't that one of the rules that I stated to you?

A. That is one of the rules; yes, sir.

Q. And must it not be within a limit that is entirely safe and prudent and due consideration being given to the condition of the track, weather, and all the circumstances surrounding it? Isn't that your rule?

COUNSEL FOR DEFENDANT: In examining witnesses the rule requires that the written or printed rules be presented to the witness.

By Col. KIBLER: I want to ask you if it would have taken any more time to have stopped at the station for passengers had there been any there to go and go on than to have stopped and gone back after you were notified that somebody or something had been struck?

A. It would take a great deal more time to have gone back.

WILLIS R. STONE, being duly sworn, testified as follows:

Direct examination by Col. KIBLER:

Q. Were you fireman on this train on the 1st of August, 1888?

A. I was.

Q. How long have you been fireman?

144 A. About 9 years.

Q. State to the jury whether there was any whistle for that station and crossing.

A. The whistle was blowed.

Q. Where?

A. Between the track-walker's shanty and the whistling post.

Q. State what kind of a whistle it was.

A. One long blast.

Q. State whether it was the usual whistle for that station and crossing.

A. Yes, sir.

Q. Where were you when the whistle quit sounding?

A. I was on the left-hand side.

Q. I mean what position on the road from the point where you commenced whistling?

A. I suppose ten or fifteen feet; say, 25 feet.

Q. What, if anything, did you do when the whistle quit sounding?

A. I commenced ringing the bell; rung the bell from Locust Grove crossing past over the second crossing, Kinney's crossing.

Q. Did you keep on continuously?

A. Yes, sir.

Q. Where was your position at that time?

A. Left-hand side.

Q. Did you see the horse and buggy?

A. Not until after we struck them.

Q. What did you see then?

A. All I seen of it was a shaft come up close to the window.

Q. Did you see any persons?

A. No, sir.

145 Cross-examination by Judge HUNTER:

Q. How long had you been running on that division before this injury?

A. 7 years.

Q. You were familiar with the crossing then?

A. Yes, sir.

Q. Passed it twice every day for nearly all the time?

A. Yes, sir; except when the engine was in the shop, and sometimes I would lay off.

Q. Are you in the employ of the Baltimore and Ohio Railroad Coo. now as fireman?

A. Yes, sir.

Q. Did you get a subpœna in this case?

A. No, sir.

Q. You came up here voluntarily to testify, did you?

A. Mr. Rankin, the company's employé—that is all I know.

Q. Mr. Rankin notified you to come here, didn't he?

A. Yes, sir.

Q. Who is he?

A. Some officiel of the B. & O. That is all I know.

Q. Is he the detective of the company?

A. I don't know.

Q. You came up here on a pass, did you, from Newark?

A. I didn't see the pass.

Q. You didn't pay any fare?

A. No, sir.

Q. The railroad runs through a cut, does it not?

A. Yes, sir.

Q. Pretty narrow cut?

146 COURT: Unless there is some controversy on that point, and I do not understand that there is, I think I will have to exclude any further testimony on that subject.

Q. Is there a curve just south of Locust Grove crossing?

A. Yes, sir.

Q. How much of a curve?

A. I could not say.

Q. How near did you have to come to the crossing before you can see it coming from the south?

A. I never measured it. I don't know how far it is.

Q. Give us your best judgment.

A. I should think between 3 or 400 feet.

Q. Did you have your deposition taken concerning this injury?

A. Yes, sir.

Q. Didn't you say you would get within a hundred feet of the crossing before you could see it in your examination then?

A. I don't know; it has been so long. I never was before in a court, and that is why I say now that I don't know how far I testified then?

Q. Wasn't this question put to you and didn't you answer it?

A. I wouldn't say positive.

Q. "How near must the locomotive come to the crossing there before you could see the crossing?" and didn't you answer "About a hundred feet or along there"?

A. I don't know what to say about that. I am here to tell the truth.

By the COURT: Do you remember whether you said that in your deposition?

A. I don't remember.

By Judge HUNTER: That deposition was taken shortly after the accident, wasn't it?

147 A. Let us see. About 2 weeks, I think.

Q. You recollected better then than you do now?

A. I don't know how long it was after the accident when they took our deposition. I have been trying to think it over what I did testify there.

Q. Were you looking out of the windows?

A. Yes, sir.

Q. And didn't see the collision?

A. No, sir; only as I have testified.

Q. You saw it immediately after they struck?

A. Yes, sir.

Q. Did you feel the jar?

A. No, sir.

Q. There was no jar?

A. No, sir.

Q. How fast were you running?

A. Between forty and forty-five miles an hour.

Q. You immediately told the engineer that you had struck something, didn't you?

A. Yes, sir.

Q. Didn't you tell him between Locust Grove crossing and the station?

A. Yes, sir.

Q. Didn't you see the horse after——

A. No, sir.

Q. And you did not see the women that were struck?

A. No, sir.

Q. You didn't see them close to the track as you approached the crossing?

A. No, sir.

148 A. *No, sir.*

Q. Why couldn't you?

A. They were not to be seen. That is all I can tell.

Q. Wasn't it because the cut was so narrow that you could not see them until they got right onto the track?

A. I cannot answer that question.

Q. At what rate of speed does a freight train go?

A. 18 miles an hour, I believe.

Q. Why didn't you stop when you found you had struck a horse and buggy? Didn't you tell Ryan that you had struck a horse and buggy?

A. I said that we had struck a horse and buggy. Yes, sir; I told him that.

Q. Why didn't you stop?

A. For fear the freight train would run into us.

Q. It was not because you didn't care whether you hit anybody?

A. Yes; we cared. We would not kill a dog if we could help it.

Q. You would have stopped if you had killed a dog?

A. No, sir.

Q. Where did you pass that freight train?

A. National road.

Q. How far south of this place was it?

A. About 3 miles; between two and a half and three miles.

Q. You didn't see the freight train pull out, did you?

A. No, sir.

Q. Isn't it a rule of the company and are not you familiar with the rule of the company that one train is not allowed to start out after another until ten minutes elapses?

A. They can start out, but they have to fall back.

Q. Must there not be ten minutes between trains running

149 in the same direction between stations?

A. No, sir.

Q. You say that is not the rule?

A. There is a rule on passengers; it is seven minutes.

Q. You say it is a rule of ten minutes or seven minutes on freight trains; is that it?

A. In following a freight train you ought to fall back—the rule is to fall back; well, the rule don't say that; it don't state exactly that, but you can start out just after them, but you must fall back so much late behind them.

Q. How is the rule between a passenger and a freight train? You say it is ten minutes between passenger trains and seven between freight. When the train ahead is passenger and the train behind is freight how far apart must they keep; do you know?

A. I cannot answer that.

COURT: I do not see the necessity of going into that matter with

this witness or with the engineer. They are bound to know the rules, and the right way to prove the rule is by producing a copy of it. If they don't pay any attention to the rules that is negligence. I merely make this suggestion with reference to the time occupied.

JOHN BLAIR, being duly sworn, testified as follows:

Direct examination by Col. KIBLER:

Q. Were you conductor on this train on the 1st of August, 1888?
A. Yes, sir.
Q. Where were you about the time of crossing this crossing?
A. In the smoking car, sitting on the east side with the window up.
150 Q. Did you hear any whistle approaching that crossing?
A. Yes, sir.
Q. What kind of a whistle was it?
A. The ordinary whistle for a station.
Q. Describe the whistle, please.
A. A whistle of about four or five seconds' duration; one long whistle.
Q. Did you know anything about this collision at the time?
A. No, sir.
Q. Feel any jar?
A. No, sir.
Q. When were you first informed that there was a collision?
A. After we had passed there about two miles further.
Q. How long have you had experience as conductor?
A. About 25 years.
Q. What is your experience touching the ability to hear the ringing of the bell on passenger trains running at the ordinary speed?

Objection overruled.

A. Whether the sound of the bell is audible on the smoking car when the train is in motion?

By Judge COLLINS: Or any other car?

A. No, sir; the bell could not be heard at the rate of speed we were going that day in any car in the train.

By the COURT: What was the rate of speed?

A. I judge about 40 miles. If the train was running slow, why the bell can sometimes be heard in the baggage car or in the next car, perhaps; but it depends altogether on the speed that the train is making and the noise it is making.

By Col. KIBLER: Did you test that coming over from Newark this morning?
151 A. Yes, sir; I have tested it a number of times. It cannot be heard, and I do not suppose that any person in the room can say that they ever heard it.

Q. Did you hear any bell ringing all that distance this morning?

Objection.

COURT: First show that the bell was rung.

Q. What kind of a bell was there on that locomotive at that time?

A. I didn't hear it at all.

Q. What kind of a bell was there on that locomotive?

A. An ordinary locomotive bell—a good sounding bell, I would say; in fact, I know it.

Cross-examination by Judge HUNTER:

Q. Mr. Blair, ain't it very often the case they don't ring the bell approaching the crossing at all?

Objection. Sustained.

Q. Mr. Blair, then, supposing the train is standing still and that bell is rung as it ought to be rung, how far can it be heard? Can it be heard a mile?

A. Well, I presume it could. Of course, that would depend on where the train was standing and the condition of the surrounding country and the weather, &c.

Q. Under ordinary conditions?

A. Under ordinary conditions I suppose it ought to be heard a quarter of a mile, at least.

Q. Could not it be heard a mile—I mean with the train not in motion?

A. I don't know whether I can answer that question or not, satisfactorily; I do not know; I never tried it.

152 Q. I don't care whether the atmosphere is clear or cloudy, cannot you hear it a mile when the train is not in motion; have you not heard an engine a mile?

A. I presume I have.

Q. You didn't hear the bell on this train?

A. No, sir. If it had been standing still I could have heard it, no doubt.

Q. You were sitting at the open window?

A. Yes, sir.

Q. On the east side?

A. Yes, sir.

Q. In the smoking car?

A. Yes, sir.

Q. There was but one car between the smoking car and the engine?

A. Yes; that is all.

Q. You were not over 75 feet from that bell?

A. Perhaps 80 or 90 feet.

Q. When the train starts isn't there much more noise made from escaping steam than at any other time?

A. No, sir.

Q. When the train is starting out does not the steam escaping from each end of the cylinder with a great noise when the train starts?

A. Not unless the cylinder cocks should be open; then, of course, there is more noise.

Q. How are they when the train starts?

A. Usually closed. Depends altogether on how the engineer is carrying the water in the boiler.

Q. Doesn't the steam escaping from the cylinders make a great noise?

153 A. It does, escaping through the smokestack.

Q. I mean the cylinder.

A. No, sir.

Q. You say not?

A. No, sir. If the steam was escaping from the cylinders—making a noise from the cylinders—the cylinder cocks would have to be open. The only noise is the exhaust of the engine out of the smokestack.

Q. I am not speaking of the smokestack, but the cocks at each end of the cylinder; as the piston rod passes one way the steam escapes and as it comes back the steam escapes.

A. You wish to ask me if the cylinder cocks are not usually open in starting. Is that it?

Q. I ask you if the steam don't escape as the piston rod goes back and forth, and are not the cocks shut off after they get started?

A. Occasionally they do open them, but not very often, and the reason that they do is because the cylinder is full of water, which they want to let out; but that don't vary often occur that it is necessary to open the cylinder cocks.

Q. This was a short train?

A. Yes, sir; three cars.

Q. Baggage car and 2 passenger cars?

A. That is all.

Q. You heard Mr. Ryan's testimony that they come down grade to the crossing?

A. Yes, sir.

Q. Isn't it the custom to shut off steam to a great extent when they are coming down grade?

154 A. Well, it depends altogether on what kind of time you want to make. Of course a man would not hardly come down a steep grade with a full head of steam on.

Q. Isn't it a fact that when an engine is running—going—down grade without full head of steam on the steam is not making much noise, as far as that is concerned?

A. No, sir.

Q. And that coming down the grade about all the noise you hear is the running of the train?

A. The rumbling of the train.

Q. Do you say that the rumbling of the train drowns the sound of the bell?

A. I say the rumbling of the train drowns the sound of the bell.

Q. Mr. Blair, don't you know that that bell did not ring?

A. No, sir.

Q. Didn't your train stop on your way back—on your return back—where this injured woman was?

A. Yes, sir.

Q. You stopped the train and went in to see her?

A. Yes, sir. Do you want to know what I went in for?

Q. No. Didn't you say on that occasion to Mrs. Griffith and Mr. Griffith that you knew the bell did not ring, but that you didn't have to ring the bell because the whistle was sounded?

A. No, sir; most emphatically.

Q. Didn't she say to you that if the whistle had sounded and the bell rung that it would not have happened, or something to that effect?

A. I don't remember of anything of the kind.

Q. And didn't you say the *the* whistle sounded?

A. I might have said so. I think I did.

Q. And then didn't she say the bell didn't ring, and didn't you say you didn't have to ring the bell when you sounded the whistle?

155 A. No, sir; never told her anything of the kind.

Q. And nothing to that effect?

A. No, sir.

Redirect examination by Col. KIBLER:

Q. Who was with you, Mr. Blair, at that time?

A. I believe the engineer was with me.

Q. Ryan?

A. Yes, sir.

Q. State whether you were behind time in leaving national road.

A. Six minutes late.

Q. You were asked about down grade. Where did the down grade end coming from the south?

A. It ends shortly after coming over Hog Run trestle.

Q. How far from the bridge does the down grade end?

A. Well, I should say—of course, I have never measured it—in my judgment, I think it is about 1,500 feet—a thousand to fifteen hundred feet north of the Hog Run trestle. Perhaps it is not quite so far.

Q. What do you strike there at the end of the thousand or fifteen hundred feet?

A. You ascend slightly.

By Judge HUNTER: It is easier to stop a train when you are going up grade than when you are going down, isn't it, Mr. Blair?

A. Yes, sir.

156 JOSEPH M. WORKMAN, being duly sworn, testified as follows:

Direct examination by Col. KIBLER:

Q. Were you on the train on August 1st, 1888, at the time of this collision?

A. Yes, sir.
Q. In what way were you there?
A. Employed as baggage master and express messenger.
Q. Where were you—on what part of the train?
A. Baggage car.
Q. State whether you heard any whistle approaching that station.
A. I did.
Q. Where did it commence?
A. Just after we crossed Hog Run bridge a short distance; could not say exactly; in that vicinity.
Q. What kind of a whistle was it?
A. Long station whistle.
Q. How long have you been railroading?
A. Since 1870.
Q. How long on passenger train?
A. Been in baggage car since 1874.
Q. From your experience, what is it as to being able to hear the bell rung, when the train is going at an ordinary rate of speed, of such train?
A. I possibly could hear the bell if I was at the car door, but back in the car it would be out of the question for me to hear it.
Q. What car are you speaking of now?
A. Baggage car.
Q. Have you any experience in the rear car?
157 A. I have rode back in the coaches; yes, sir. You cannot hear the bell back in the train with the train running the ordinary speed.

Cross-examination:

Q. Do you say that you never heard the engine bell ring while sitting in a passenger car?
A. Not with the train running at an ordinary speed back in the train.
Q. When the train is in motion do you say that you never heard the bell ring?
A. When the train was going into a station—slowing up—but out on the road you cannot.
Q. Coming into a station do you say that you could not hear a bell ring going at the rate of 30 miles an hour?
A. I cannot say that I have.
Q. Do you say that you have not?
A. I cannot say that I have. I have no recollection of it.
Q. Have you not heard the bell ring down at Newark when they were coming in from Columbus from Lockport down to the city and don't they generally run 30 miles an hour?
A. I could hear the bell in the city a great deal easier than I could on the train.
Q. Supposing that a man is sitting at an open window of the car and the bell would ring and he was on the first or second car from

the engine and is thinking about the train and his attention is upon it and the bell would ring, don't you think he could hear that bell, engine going 30 miles an hour?

A. No, sir.

158 Q. You can hear the bell from the door of the baggage car?

A. Being at the door hanging out, I can

Q. You can hear about as well from the window as from the door, can you not? You can hear a bell rung when at the door, but when you are busy arranging your packages you are liable not to hear it; that is about the way of it. Suppose you are sitting in your baggage car and listening for the bell, don't you think you could hear it?

A. Possibly at times I could with the side doors open.

Q. Does a train make any more noise running at 40 miles an hour than it does at ten?

A. It does.

Q. There is not so much exhaust of the steam. Don't the long strokes with the engine going slow make more noise than when the train is going and in full motion? Isn't there more noise when the train is starting than when it gets started? Ain't there as much creaking and rattling when the train is pulling out as at any time?

A. No, sir.

Q. You are still in the employ of the B. & O. Company?

A. I am, and the U. S. Express Co. together.

Q. You did not hear the bell on this occasion?

A. I did not.

Q. Were your doors open?

A. They were.

Q. What were you doing when you were approaching that crossing?

A. When it whistled for the crossing I looked up to see if he had any one for the station. I looked up to see if the bell pulled to see if he had any one for there when we came up to the crossing

159 or where I supposed that he could see the station to see whether there was any one there to stop. At that time I piled up my Newark freight on the west side of the car so that the express wagon could back right up to the car and take it up, and I waited for him to answer the signal and then commenced to pile up my freight in the west door. I get my Newark freight proper up to the door and pile it up in the door.

ISAIAH VAN HORN, being duly sworn, testified as follows:

Direct examination by Col. KIBLER:

Q. On August 1st, 1888, were you a passenger on the train going north?

A. Yes, sir.

Q. What time was it?

A. 11 o'clock; between eleven and twelve.

Q. Where were you sitting?

A. Sitting in the smoking car on the west side as we went north.
Q. Did you hear the whistle sounded?
A. Yes, sir; I did.
Q. What kind of a whistle was it?
A. A long whistle.
Q. About where; do you know?
A. It was within a short time after they crossed Hog Run bridge.
Q. Did you see anything of this accident?
A. I seen something at the roadside as the train went by.
Q. What did you see?
A. I seen a buggy.
160 Q. See any persons?
A. No, sir; I did not.
By the COURT: See it before it was struck of after?
A. No, sir; after it was struck.

Cross-examination by Judge HUNTER:

Q. Was the buggy mashed up?
A. It looked to me like it was.
Q. Didn't see a woman lying under it?
A. No, sir; did not.
Q. Didn't hear the bell rung?
A. No, sir; did not.
Q. Sitting on the west side of the car?
A. Yes, sir.
Q. Window up?
A. No, sir.
Q. Window up near you?
A. Could not say as to that
Q. Hot day, wasn't it?
A. Tolerably warm day.
Q. The 1st of August?
A. 1st of August.
Q. Was your attention on the train as it approached there?
A. Why, partly.
Q. Were you thinking anything of their stopping at Locust Grove?
A. Now, I don't know whether I was thinking about that or not; could not say as to that.
Q. When you saw the buggy there did you notice—was
161 not your attention called to the signals; did — not hear the bell rung?
A. No, sir; didn't hear it rung then.
Q. After you saw the buggy?
A. No, sir.
Q. Did you think about it?
A. No, sir; paid no attention to it whatever.
By the COURT: What is your business?
A. Blacksmith.

Q. In the employ of the railroad company?
A. No, sir.
By Judge HUNTER: Have you ever heard the bell ring sitting on a passenger car?
A. I have; yes, sir.
Q. When the train was going?
A. Not when it was going very fast.
Q. Have you heard it ring when the car was in motion?
A. Yes, sir.
By Judge COLLINS: When it was running slow?
A. Yes, sir.

J. C. SCOTT, being duly sworn, testified as follows:

Direct examination by Col. KIBLER:

Q. What is your business?
A. Livery business.
Q. Where—in Newark?
A. Newark; yes, sir.
Q. Did you go out to the place of this accident or near it at any time?
162 A. Yes, sir.
Q. When was it?
A. The 28th day of August, 1888.
Q. What did you do when you went there?
A. We drove up over the railroad and out on the county road for a short distance and turned around and drove back within about 250 feet of the track.
Q. You drove over this crossing, did you?
A. Yes, sir.
Q. Where did you come from—Newark?
A. Newark; yes, sir.
Q. After crossing the railroad at that road crossing how far did you go west?
A. Well, I don't know exactly how far; probably six hundred feet before we turned around; drove on until we found a good place to turn.
Q. You didn't go to the Hog Run bridge on that road, did you?
A. No, sir.
Q. Did you make any observations as to whether you could see the railroad or the train?
A. After we turned around and drove back within about 250 feet of the railroad we stopped and looked.
Q. What did you see?
A. We could see the railroad from where we stood down through a ravine.
Q. While you were there did the train come along?
A. Yes, sir.
Q. State whether or not you could see the train coming from that point.
163 A. We could see the train, I suppose, half a mile away.

Q. Did you make any observations?

A. We watched the train until it went out of sight and until it crossed the crossing.

Q. Did you at any other point determine whether you could see the railroad?

A. We could see the train until it got within—well, it commenced to go out of sight about, I suppose, six hundred feet away from the crossing—before it reached the crossing. The train was coming north.

By Judge HUNTER: That was when you were standing at the point 250 feet away?

A. Yes, sir. It commenced to go out of sight about six hundred feet away from the crossing.

By Col. KIBLER: I mean at any other point in that highway did you determine whether you could see the train?

A. No, sir.

Q. At what point were you on the ground?

A. Sitting in a carriage.

Q. Who was with you?

A. Mr. Cory Brady, Mr. Pigg, and Mr. Smith was in the carriage with me at the time.

Q. That is the engineer?

A. Yes, sir.

Q. The train was out of sight six hundred feet from the crossing?

A. We thought it was about 600 feet away from the crossing where it commenced to go out of sight.

Q. What distance would you say it was from the crossing when it was entirely out of sight?

164 A. I suppose it was about 300 feet from the crossing. We were 250 feet west of the crossing and stood still all the while. The train was about 300 feet from the crossing when it went out of sight.

Cross-examination by Judge HUNTER:

Q. Mr. Scott, you say in coming along the road you were within 250 feet of the crossing. Then you could look across the low ground and see the railroad track a half a mile away?

A. We supposed it was that distance.

Q. Well, near that?

A. Yes, sir.

Q. And then, as you come nearer the crossing, then you cannot see the railroad at all, can you?

A. Not if you get nearer the crossing you cannot see the railroad.

Q. After you cross the Hog Run county bridge and approach the first little raise you can look across from the road and see the railroad and see the Hog Run railroad bridge?

A. I suppose. I have been across the Hog Run bridge, but don't know really where it is located.

Q. And then you come down into a little hollow, and you can look

across that ground where the swamp was and see the train 300 feet away?

A. I think that is where we were.

Q. How does this strike you: Suppose that is your crossing and you point 250 feet away is there?

A. I guess that would be about right.

Q. And then you go on closer to the crossing, and then the cornfield and the high ground and fences and bushes obstruct the
165 view. You could not see the railroad track after you get closer to the crossing than that 250 feet, could you?

A. You might have been a few feet closer, but after you get down some feet you could not see the train.

Q. And when you get a hundred or two hundred feet of the crossing you could not see the railroad at all?

A. I do not think you could.

DAVID H. PIGG, being duly sworn, testified as follows:

Direct examination by Col. KIBLER:

Q. Are you connected with the railroad or ever been?

A. No, sir; I am not.

Q. State whether at any time you went out to Locust Grove crossing to examine the road and the country around there?

A. I was out there, I think, about the 28th day of August, 1888.

Q. In a carriage?

A. Yes, sir.

Q. State what you did and saw there.

A. We arrived there a few minutes before the train was due from the south and took a position about—didn't measure it, but in my judgment it would be about—250 or 300 feet west of the crossing and watched the approach of the train from the south.

Q. What did you see?

A. From that point we could see the train coming about—well, I think, over half a mile.

Q. Were you on the ground or where were you when you made that observation?

A. Sitting in the carriage.

Q. What else did you see, if anything?

A. Nothing.

166 Q. Turn around at that point?

A. We returned from that point.

Q. About how far from the crossing of the highway could you see the train that you observed as it came up?

A. It disappeared in the cut—began disappearing at about six hundred feet south, and then at about three hundred feet it was entirely out of sight.

By the COURT: Where were you then?

A. Back at a point 250 or 300 feet. We could see the train over a half mile. It began disappearing at a point 600 feet south, and a distance of 300 feet from the crossing it was entirely out of sight.

Cross-examination by Judge HUNTER:

Q. You were not in the employ of the railroad Co.?

A. No, sir.

Q. You just went out on that occasion to accommodate them a little?

Q. Went out at the request of Mr. Rankin.

Q. Went out at the expense of the company?

A. They didn't give me anything.

Q. You didn't pay for the carriage; the carriage didn't cost you anything?

A. No, sir; it did not.

By a JUROR: Don't understand one point about the road and the railroad.

By Judge HUNTER: Suppose that is the crossing, here comes the county road going west; it curves around there and goes over Hog run—crosses the railroad there; it curves there and crosses the railroad here. Is that right?

167 Col. KIBLER: Yes, sir.

By Judge HUNTER: And the county road coming along in that direction until it passes this curve and then it goes down to the crossing; out this way to Newark, and here is a low place where your carriage was and you could see the cars in that direction and see the track?

WITNESS: Yes, sir.

Q. And now coming up here where these marks are then you cannot see it?

A. Disappears behind the cut here.

C. S. BRADY, being duly sworn, testified as follows:

Cross-examination by Col. KIBLER:

Q. What is your business?

A. I am an officer at the State prison now.

Q. I will ask you whether about August, 1888, you went out to the scene of this accident and looked at the country road around there?

A. Yes, sir; I went out some time in the month of August.

Q. Who went with you?

A. Mr. Rankin and Mr. Pigg, and I believe Mr. Scott.

Q. Did you drive across this railroad at the county road at Locust Grove crossing?

A. Yes, sir.

Q. Where did you go further?

A. We were west a little piece just a short distance.

Q. What did you see further?

168 A. Well, we were looking at the distance that you could see the train. We were there about the time for the train to come.

Q. Where did you stop, if you stopped, to look for that?

A. West of the crossing.

Q. What could you see or did you see?

A. We could see the train coming from the south; first saw the train from half to three-quarters of a mile from where we were.

Q. How far were you from the crossing at that time?

A. Well, in the neighborhood of 300 feet; anywheres from 250 to 300 feet.

Q. About what distance from the highway crossing did the train disappear, if it disappeared at all?

A. Well, it commenced to disappear perhaps six or seven hundred feet away from the crossing, and it would go out of sight about half that distance from the crossing.

Q. Were you on the ground or in the carriage?

A. Both; was in the carriage awhile and got out.

Q. When you were on the ground could you see it?

A. Yes, sir.

Q. How far could you see the train of cars there?

A. I didn't get out until the train started around the bend. I could see about half the distance I speak of.

Q. What do you mean by half the distance?

A. Quarter of a mile.

Q. Did you go further west or what did you do, turn around?

Q. The carriage was turned before the train came.

Q. You were facing the east?

A. Yes, sir.

169 A. Yes, sir.

Q. And then you went on?

A. Yes, sir.

No cross-examination.

It was here agreed between counsel for plaintiff and counsel for defendant that the deposition of Frank Gray, taken in the case of Ebenezer Griffith *vs.* The Baltimore and Ohio Railroad Company, pending in the court of common pleas of Licking county, Ohio, may be read in evidence, Mr. Gray having been subpœnaed by defendant, but being sick and not able to be present.

Said deposition is as follows:

FRANK GRAY, of lawful age, being *my* me first sworn as hereinafter certified, deposes and says:

Q. 1. State your name, age, occupation, and place of residence.

A. 1. My name is Frank P. Gray; am 35 years of age; am a farmer now. I live with my father-in-law, Joseph Musselman, about four miles south of Newark, Ohio.

2nd Q. State whether or not on August 1st, of this year, you observed the passenger train going north on the Shawnee division of the B. & O. railroad, due in Newark at 11.10 a. m., when it passed the place where you now reside, near Locust Grove crossing.

A. 2. Yes, sir; I did.

Q. 3. Where were you and at what were you engaged at the time this train approached this crossing?

A. 3. I was in the yard mowing grass.

Q. 4. How far is this location from this crossing?

A. 4. Well, as near as I can guess it, it is about a quarter
170 of a mile.

Q. 5. State whether or not, from where you were, you heard the train cross the Hog Run bridge.

A. 5. Yes, sir; I did.

Q. 6. Please state whether or not any signal was given by the locomotive upon the approach of that train to the Locust Grove crossing?

A. 6. I heard a whistle sound up there.

Q. 7. Just describe what kind of a whistle it was?

A. 7. Well, it was a usual whistle it was that I hear up there.

Q. 8. State when it was that this whistle sounded, with reference to the time the train crossed the Hog Run bridge?

A. 8. Well I was in the house and looked at the clock; my wife drew my attention to the clock that it was five minutes of twelve. I went right out of the door and picked up my scythe and went to mowing again; then I heard the train coming across the trestle; the whistle sounded directly after the train crossed the trestle.

Q. 9. State whether or not any freight followed after the passenger train, in that same direction; and, if so, give as nearly as you can the time which intervened between the trains.

Q. 9. There was a freight train loaded with coal followed the passenger train shortly afterwards.

Q. 10. You cannot state the exact time?

A. 10. No; but it was not very long.

171 Cross-examination:

Q. 11. How far was it from where you were to the crossing? Was it not half a mile?

A. 11. No, sir; I guess it was a quarter of a mile.

Q. 12. Were you there when that same train came along the day before?

A. 12. No, sir.

Q. 13. When did you notice that same train before that?

A. 13. Well, I have noticed it frequently before that.

Q. 14. When did you notice that train before that?

A. 14. Every day or so.

Q. 15. When was the last time that you noticed it before that?

A. 15. Well, I do not know that I can state the exact day.

Q. 16. How do you remember this day and not remember the other?

A. 16. Well, I had been fixing our clock, and the train generally goes by our house at half past eleven by our time, and my wife called my attention and said the clock was too fast. Well, I was in the yard mowing and I went into the house to see what time it was, and I looked at the clock and it was five minutes until 12. Then I went out and picked up my scythe and went to mowing again. Then I says to her that I believe that it is too fast, for there comes the passenger across the Hog Run trestle?

Q. 17. Had the clock stopped that morning?
A. 17. No, sir.
Q. 18. What were you doing about it when you were fixing it?
A. 18. Well, I was oiling it.
Q. 19. Did you set it that morning?
A. 19. No, sir.
Q. 20. When had it stopped before that last?
172 A. 20. The day before.
Q. 21. Who started it, and by what time?
A. 21. I started it myself, by my own time—watch.
Q. 22. Do you know whether the clock was correct or not?
A. 22. It was too fast.
Q. 23. Was not the train behind time on the day of the accident?
Q. 23. I could not say as to that.
Q. 24. Did it come along on that day by your clock as early as usual?
A. 24. Well, I could not say as to that. Sometimes the train varies with our clock.
Q. 25. How many cars were there on that train?
A. 25. There was two passenger cars, a baggage coach.
Q. 26. Did they slack up at the crossing or after they passed it?
A. 26. No, sir.
Q. 27. How fast were they running, if you know?
A. 27. Well, they were running about as fast as usual. I could not say the time they were making.
Q. 28. Were they running as fast as a freight train usually runs?
A. 28. I should judge that they were, and a little faster than a freight train usually runs.
Q. 29. From the speed that the two trains were running, did it appear that the freight train would catch the passenger train?

Question objected to by defendant's attorney.

A. 29. I could not say as to that. When the freight train went by I was in the house eating my dinner.
Q. 30. How long did you work after the passenger train went by before you went in to your dinner?
A. 30. As the passenger train went by I laid down my scythe, went to the cistern and washed, and went in to dinner.
173 Q. 31. How long did you work after the passenger train went by before you went in to dinner?
A. 31. As the passenger train went by I laid down my scythe and went in.
Q. 32. Did you draw water from the cistern?
A. 32. No, sir; I pumped it.
Q. 33. How much did you pump?
A. 33. An ordinary wash basin half full, probably.
Q. 34. Did you roll up your sleeves first?
Q. 34. I do not remember.
Q. 35. How long were you engaged in washing—how many minutes were you engaged in washing?
A. 35. I could not tell how many minutes exactly.

Q. 36. Where did you find the towel?
A. 36. About 10 or 12 feet from where I stood and washed.
Q. 37. Where did you find the towel?
A. 37. About 10 or 12 feet from where I stood when I was washing.
Q. 38. Upstairs or down?
A. 38. Down.
Q. 39. Inside or out?
A. 39. Outside.
Q. 40. Hanging up or lying down?
A. 40. Hanging on a roller.
Q. 41. Back porch or front porch?
A. 41. Back porch.
Q. 42. Were you mowing in the front or back yard?
A. 42. In the back yard.
A. 43. Did you wipe your face and hands?
A. 43. Yes, sir.
174 Q. 44. How long had you been eating before the freight passed?
A. 44. I had not eat any yet. I had just sat down.
Q. 45. How far is it from there to the national road?
A. 45. Well, if you can tell me how far it is from here to the national road I can tell you.
Q. 46. How far were you from the house when your wife called you?
A. 46. Well, it was probably 50 or 60 yards.
Q. 47. Well, then, it would take you five minutes to go to the house, wouldn't it?
A. 47. I understood you to say, How far was it to the railroad?
Q. 48. How far were you from the house when your wife called you?
A. 48. Well, I was probably 15 feet, as near as I can guess at it.
Q. 49. And when you were called to dinner you dropped the scythe promptly without finishing the row?
A. 49. Yes, sir; for I was getting hungry.
Q. 50. How long was it after you heard the whistle that you heard the train pass—in minutes?
A. 50. Shortly afterwards.
Q. 51. How long was it after you heard the whistle that the train passed—in minutes?
A. 51. I could not give the minutes. I do not think it exceeded one.
Q. 52. How far were you from Hog Run bridge?
A. 52. That is a quarter of a mile to the crossing and another quarter to the bridge, is that correct?
—. ——.
A. 53. It is to the best of my judgment.
Q. 54. Then you think that the train whistled about a half of a mile or less than a half of a mile from where you were?
175 A. 54. Well, I could not say the exact distance.

Q. 55. Did not you say that the train whistled after it passed the Hog Run bridge?

A. 55. Yes, sir; it whistled after it came across the Hog Run bridge.

Q. 56. Did not you say that the Hog Run bridge was within about half a mile from where you were?

A. 56. To the best of my judgment it is.

Q. 57. Where is your residence?

A. 57. I live with my father-in-law, Joseph Musselman.

Q. 58. Do you live in the county of Licking?

A. 58. Yes, sir.

Q. 59. Have you any present intention of removing from this county?

A. 59. No, sir.

Q. 60. Have you any present intention of being absent from this county when this case is being tried?

A. 60. No, sir; I have not.

Q. 61. Was any other signal given from that train, but the whistle?

A. 61. That is all that I heard.

Q. 62. Is your hearing good?

A. 62. Yes, sir; I never found any fault with it yet.

Q. 63. What sort of a whistle did you hear sounded?

A. 63. The usual sound—the usual whistle for crossings.

Q. 64. What sort of a whistle did you hear on that occasion?

A. 64. A long, keen whistle.

Q. 65. Were there any toots?

A. 65. There might have been.

Q. 66. Don't you know that if there had been short toots
176 following the long blasts that it would have been a signal to stop at Locust Grove station?

A. 66. Well, for my part, I do not know anything about these railroad signals.

Q. 67. Well, then, describe the whistle that was sounded just as it was?

A. 67. I do not know that I could describe the whistle just as it was, exactly; only I remember a long, keen whistle.

Q. 68. Do you work for the B. & O. Railroad Company?

A. 68. No, sir.

(Signed) FRANK P. GRAY.

Defendant rests.

177 COUNSEL FOR PLAINTIFF: We desire to offer this plat of Locust Grove crossing in evidence.

Plaintiff rests.

The foregoing bill of exceptions contains all of the testimony introduced upon the trial of said cause.

At the conclusion of the testimony the defendant, by its counsel, presented to the court thirteen specific instructions and requested the

court to give each of them to the jury, said requests for such instructions being asked severally.

The said instructions so requested are as follows:

178 1. The speed of the train, as shown by the testimony, cannot be considered by the jury as tending to sustain the charge of negligence in the management thereof, as alleged in the petition.

Which instruction the court refused to give; to which refusal of the court defendant, by its counsel, excepted.

2. The fact that the train did not stop after the accident cannot be considered by the jury as tending to sustain the charges of negligence in the petition.

Which instruction the court refused to give; to which refusal of the court defendant, by counsel, excepted.

3. There is no testimony in this case tending to show mismanagement of the train as it approached this crossing at the time of the accident and the injuries complained of other than that with regard to the signals and the ringing of the bell.

Which instruction the court refused to give; to which refusal of the court defendant, by counsel, excepted.

4. The testimony shows clearly that the whistle on this locomotive was sounded as this train approached this crossing at the time of this accident, and upon that part of the case the jury is directed to find for the defendant.

Which instruction the court refused to give; to which refusal of the court the defendant, by counsel, excepted.

5. The failure to ring the bell is not charged in the petition as an act of negligence, causing or contributing to the injury complained of in this case, and cannot be considered by the jury as tending to prove such negligence.

179 Which instruction the court refused to give; to which refusal of the court defendant, by its counsel, excepted.

6. If the plaintiff, immediately before the horse stepped on the track, could have seen the approaching train in time to have stopped, had she looked, the presumption is that she did not look or, if she did look, she did not heed what she saw, and in either case she was negligent and cannot recover.

Which instruction the court gave to the jury as requested by the defendant.

7. If the plaintiff could have heard the whistle sounded and did not hear it because she did not listen for it or, having heard it, did not heed it she was in either case guilty of contributory negligence and cannot recover.

Which instruction the court gave to the jury as requested by the defendant.

8. The fact that this was a dangerous crossing increased the care required of the plaintiff in approaching and driving on it in proportion to the danger to be apprehended. If the crossing was extraordinarily dangerous it required extraordinary care and caution on the part of the plaintiff to ascertain if a train was approaching and failing in this she cannot recover.

Which instruction the court gave to the jury as requested by the defendant.

9. The testimony in this case shows that the plaintiff was guilty of negligence contributing to her injury. Such being the fact she is not entitled to recover and your verdict must be for the defendant.

180 Which instruction the court refused to give; to which refusal of the court the defendant excepted.

10. It was the duty of the plaintiff to stop before driving on this railroad track and allow the train to pass before she attempted to cross, and if she failed so to do and was thereby injured she cannot recover in this case.

Which instruction the court refused to give; to which refusal of the court defendant, by its counsel, excepted.

11. Upon the subject of the ringing of the bell the testimony of the engineer and fireman, who state affirmatively that it was rung, is of more weight than the testimony of the witnesses who testify that they did not hear it, other things being equal.

"It is a rule of presumption that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to a negative may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed." Stitt *v.* Haidekoper, 17 Wallace, 394.

Which instruction the court gave to the jury as requested.

12. It is the duty of the jury to reconcile the testimony of the different witnesses and find a verdict in accordance with the testimony so reconciled, when that can be done. In this case several witnesses, who were passengers on this train, say they did not hear the bell sounded, while the engineer and fireman say it was sounded; but, on the other hand, the uncontradicted testimony shows that the passengers on this train could not have heard the bell if it was rung, and there if, therefore, no conflict between these witnesses and, reconciling their testimony upon the principle stated, it shows that the bell was rung for this crossing.

181 Which instruction the court refused to give; to which refusal of the court the defendant, by its counsel, excepted.

13. The testimony in this case fails to show the acts of negligence charged and the jury is therefore instructed to return a verdict for the defendant.

Which instruction the court refused to give; to which refusal of the court the defendant, by its counsel, excepted.

Thereupon the court charged the jury as follows, and no other charge was given to the jury by the court other than that which follows:

182 *Charge.*

GENTLEMEN OF THE JURY: This action is to recover damages against the Baltimore and Ohio Railroad Company for injuries received on the first of August, 1888, at Locust Grove crossing,

about four and one-half miles south of Newark, by the collision of a train with the horse and buggy in which the plaintiff was then riding with her mother, who was driving. The accident occurred about twelve o'clock at noon of that day.

The testimony of the mother is that between ten and eleven o'clock she started with her daughter from their home, which is twelve miles from Newark, intending to go to Newark. They were in a phaeton buggy, the top of which was up and the side curtains off, so that the view was unobstructed. When they reached Hog Run bridge, as it was called in the testimony, which is about a quarter of a mile from the crossing, they began, according to her testimony, to watch for the noon train. She states that they were watching for the noon train. They drove very carefully, according to her evidence. There was no sign of the train. Passing from the bridge, they went up a little hill. Passing from the bridge, they could see the track and could have seen the train if it had been there; but they saw no train. Passing on up to the top of the hill, they drove carefully; saw no sign of the train. At the top they stopped and listened, but heard nothing; then drove slowly
183 down the hill. She testifies that at the top of the hill they were about fifty yards from the crossing; that it was near the train time, or, as she expresses it, "it was very close;" must have been twelve o'clock, she testifies, and that the noon train was due at twelve.

According to this testimony, gentlemen, the mother knew that the time for the approach of the train was at hand. Then, according to *her* testimony, they went down the hill slowly. On the right-hand side, which was the side from which the train from the south would approach, there was a bank and also a field of growing corn some ten or twelve feet high, which, she states, shut out any view of the train; that by reason of these obstructions they could not see the track nor an approaching train until, as she expressed it in her testimony, they were within a very short distance from the track. You will remember the testimony, gentlemen, indicating perhaps as far as from where I am sitting to that corner of the window (about forty feet). When the horse got his two forefeet upon the track they saw the train coming, as she expresses it, "like lightning," within a few yards of them. Her daughter threw up her hands and said, "Oh, ma!" and that was all that was said. Instantly the horse was struck in the neck and shoulder and thrown some sixty feet, the phaeton some thirty feet, the daughter underneath, the mother rendered unconscious. She first regained her consciousness and then managed to assist her daughter to a house near by.

It is admitted that the daughter would testify that she had no recollection whatever of any of the facts that occurred. That
184 is not a remarkable circumstance, gentlemen. It seems to be a merciful dispensation of Providence to paralyze the faculties and the feelings so that, so far as it has been possible to investigate the matter, the general opinion of those who have given attention to it is that even in the most dangerous and apparently

painful accidents there may be little actual pain or suffering at the time, but there is an unconsciousness which renders the sufferer unable in most instances to recollect anything that occurred. At all events, it is admitted that this plaintiff would testify that she remembered nothing whatever of the circumstances.

The mother testifies that they heard no whistle; that they were listening for it, and that they heard no bell. Now, upon cross-examination she testified that from the end of the field of growing corn—that is, from the lower edge of the growing corn—to the track the distance was about equal to that from one corner of the court-room on the other side of the hall to the corner diagonally opposite—I suppose forty or fifty feet—and there is one witness, Mr. Holtzberry, who testifies for the plaintiff (he was sitting in the smoking car as the train approached, and the window of the car where he was sitting was up) that he remembers the approach of the train to that crossing on that day; that there was a whistle just when the train crossed Hog Run bridge—railroad bridge—and that was all the signal that he heard; that he did not hear the bell ring. There was the testimony of other witnesses that while the train was in rapid motion it would not be possible to hear the ringing of the bell on the train, even in the smoking car. This witness, however, testified that he put his head out, was going to look to see whether he could see a coal train, which was following the
185 passenger train, coming behind them, with reference to which you have heard the testimony. When he first put his head out he looked in front and saw the horse just coming down the steep bank onto the railroad track, and (then the collision occurred) and he saw two persons, one thrown down towards the train and the other towards the side of the hill; that it was about seventy-five yards from the crossing when he saw what I have just stated to you. If that was true, gentlemen, why it necessarily follows, it seems to me, that those in the buggy could see him—that is, could see at least as far back on the train as to the smoking car—for the very obvious reason that if I, sitting here, can see the juror sitting in the corner, he, sitting in the corner, must be able to see me; and therefore, according to this testimony, the train was visible to the occupants of the phaeton before the phaeton reached the track.

Now, gentlemen, as to the testimony in this case, you are to be the judges. It is my duty to give to you such instructions concerning the law as may be necessary for the proper understanding and construction of the testimony. Whatever I may say about the testimony, will be only for the purpose of enabling me to make more clearly understood what I have to say about the law, leaving to you to decide, not by what I may say, but by your own recollection what the facts are.

The ground of recovery in such an action as this must be the negligence of the defendant. That is not to be inferred as matter of course nor from the mere fact of the occurrence of the accident. In other words, the happening of the event does not raise the
186 presumption of negligence on the part of the defendant. The

burden of proof is upon the plaintiff, by which is meant that it is necessary for the plaintiff to establish by a fair preponderance of testimony that the negligence which is required to entitle a recovery occurred. By a preponderance of testimony is not meant, necessarily, by a greater number of witnesses, but that the testimony shall fairly preponderate—that is, make the stronger impression upon your minds. For instance, one witness may create a stronger impression upon a jury, and properly so, than half a dozen witnesses testifying to the contrary, because by the manner, candor, and intelligence of a witness his or her testimony may so impress itself upon the jury as to overcome in weight the testimony of half a dozen other witnesses. That is what is meant by a preponderance of evidence—that it shall produce a stronger impression. Ordinarily, witnesses being equal in other respects, the number of witnesses would control, but, as I have just stated, it is not necessarily so.

Now, there are mutual duties attending the approach of a train and the approach of travellers where the railroad crosses the highway at grade. The law requires that the railway company under such circumstances shall sound its whistle at a distance of at least eighty rods and not more than one hundred rods from the place of crossing, and that the bell shall be rung continuously until the engine passes the crossing; and the law of Ohio expressly provides that if either or both these signals are omitted the railroad company shall be liable for any injury or accident happening by reason thereof. I will have occasion to speak of this further on.

187 There is a duty also upon the plaintiff in every case, and that is to exercise ordinary care and prudence in approaching a crossing, taking into account the perils to be encountered and all the other circumstances attending the approach. The degree of care required is that which persons of ordinary care and prudence are accustomed to employ for safety under like circumstances. It is the duty of a person approaching such a crossing to look and listen whether he be in a vehicle or on foot, to watch for the approach of the train, and especially, gentlemen, if the person approaching knows that a train is to be expected at or about the time is this duty of watching and of listening and of care increased, because, manifestly, the care must be according to the circumstances, and if the crossing be a dangerous one that only makes it more incumbent upon the traveller approaching to exercise greater care. At the same time the person approaching has a right to expect that the whistle will be sounded as required by law, and the bell rung; and yet the failure to sound the whistle or to ring the bell would not necessarily determine the case, because there is a rule relating to what is termed contributory negligence that must always be kept in view in passing upon cases of this character. If the party injured and claiming damages has by his own carelessness or negligence contributed materially to the injury, that is fatal to a recovery, because the law will not apportion the negligence. If the injury is chargeable in part to the negligence of the plaintiff, and in part to the negligence of

188 the defendant, in other words, if the negligence of the plain-

tiff, although it actually existed, would not have caused the injury but for the contributory negligence of the defendant, then the plaintiff cannot recover, because the law does not recognize that there can be any division—that there can be any computation and apportioment of the degrees of negligence in such case. There is a department of the law in admiralty where collisions occur between vessels at sea, where it is held that if both parties be in fault the damages shall be apportioned, but that is an exception. On the land, whenever both parties are in fault, why that circumstance is fatal to a recovery, unless it appear that notwithstanding the negligence of the plaintiff the defendant might have avoided the injury, and there is no testimony in this case which makes that portion of the rule applicable, so far as I remember the testimony.

Now, whether the whistle was sounded depends upon the weight which you give to the evidence of the witnesses in the case, *pro* and *con*. I think that the mother of the plaintiff does not testify that it was not sounded, but she does testify that she did not hear it. I do not remember myself, gentlemen, that there is any other witness in the case who testified that the whistle was not sounded. On the contrary, according to my recollection, every witness who testified upon that subject testifies that it was sounded. Some testify that it was sounded just as the locomotive came upon the Hog Run bridge; others, and perhaps a majority, that it sounder after the locomotive left the Hog Run bridge and was approaching the crossing; that it was a whistle of about five seconds—one long whistle. Upon the subject of the ringing of the bell the testimony of the plain-
189 tiff is that she did not hear it. The testimony of several witnesses is that they did not hear it. The testimony also is that it was not possible to hear that bell on the train while it was in rapid motion, the general testimony in the case being that the train was moving at the rate of from forty to forty-five miles an hour.

The engineer and the fireman testify positively that the bell was rung, and, other things being equal, that testimony is entitled to greater weight than the negative testimony, because there is a rule of evidence or presumption that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to the negative may have forgotten. It is possible to forget a thing that did happen; it is not possible to remember a thing that never happened. That is a rule recognized in the text-books and it has been expressly recognized by the Supreme Court of the United States.

But, after all, gentlemen, it is for you to decide whether the whistle was sounded, whether the bell was rung.

Something had been said in the course of the argument with reference to the speed of the train. Gentlemen, I do not understand that it is the duty of those in charge of a railroad train to slow up upon approaching a crossing. One object of railroad passenger transportation is to accomplish a high rate of speed. The statute has prescribed the signals which are to be given and they furnish the precaution which is ordinarily to be observed in approaching a

crossing. There is a rule that when a train is passing through
190 the streets of a city or town, and it may apply in the immediate vicinity, where a large number of persons may be expected to be passing, that the speed shall be slacked according to circumstances, but ordinarily the rule requires only that the proper signals shall be given. For instance, in this case the testimony is that the whistle could be heard a distance of two or three miles, as I recollect the testimony, certainly a distance of a mile, which is greater than the distance between the train when according to the testimony, the whistle was sounded and the plaintiff and her mother in the buggy. There is testimony that the bell could be heard for at least as far, and in the country, where ordinarily everything is quiet and but few persons passing, the road not crowded, these signals would generally be sufficient to properly guard against danger at the crossing if they were sounded.

Now, gentlemen, I have to say to you with reference to the approach of the plaintiff and her mother to this track, that if, at a distance equal to that indicated by the mother—the line across the court-room from the place where the horse was struck—the track could be seen, and if they knew, as the mother testifies they did, that it was about the time for the train, it was unquestionably their duty to stop and listen there. The very fact that between the top of the hill, at a distance of fifty yards back from the track, they were at the last point where they could see the train, and from there down to the end of the corn-field they had been passing over a little piece of road where the track and the train were not visible, would make it the more necessary to stop and take the precaution of looking and listening before going on the track. Now, is there
191 any evidence in the case that they did stop, or is the evidence, on the other hand, that they continued slowly, it is true, but nevertheless without stopping, from the top of the hill right onto the track.

If that was the case, gentlemen, why, sad as the results were, the claim against the railroad company could not be maintained. It is not the mere fact of the happening of the accident that lays the foundation for a recovery. It must be based upon satisfactory proof that there was not only negligence on the part of the defendant, but that there was no contributory negligence on the part of the plaintiff. With reference to the proposition that there was contributory negligence the burden of proof is upon the defendant, and you must be satisfied of that by a preponderance of evidence before you find that there was contributory negligence.

If you find that this accident occurred by reason of the negligence of the defendant, and that there was no contributory negligence immediately contributing to the injury on the part of the plaintiff, why then you come to the question of damages. The damages in such a case as this should be compensatory—that is, they should be sufficient to make the plaintiff whole—to compensate for the injury—not beyond that. Nothing beyond that should ever be allowed unless the evidence satisfies a jury that there was a wilful or intentional commission of the injury, and there is no tes-

timony in th, direction in this case. A proper compensation for the pain and suffering should be made, and if damages be claimed for permanent injury, as they are in this case, the rule is
192 that it must be reasonably certain *the* that injury is permanent and that it resulted from the accident.

I may say to you, gentlemen, that the fact, if it be a fact, that this plaintiff is suffering from convulsions to which she never was subject before this injury, that they are brought on by any excitement (and I think that the only testimony upon this point is to that effect), that they continue without any sign of improvement would be a very strong indication that the injury is permanent. There is no testimony upon that subject excepting what is offered on behalf of the plaintiff. It is said that probably the permanence of the injury can still be avoided by the operation of trephining, as it is called, which consists in cutting out a section of the skull, lifting it and remedying the depression of the inner table of the skull, which is supposed to cause the pressure against the brain at that locality and to be the cause of the convulsions to which this plaintiff, according to the testimony, is subject. But, gentlemen, I need scarcely say to you that if you come to this question of damages your finding ought to be exclusively upon the testimony, and that there is no rule of law or of reason or of right which makes it proper to give any greater damages against a railroad company than should be given against an individual in like circumstances. Your duty and mine in this case is entirely apart from any feeling of sympathy or pity. It is simply and only to do what is right under the circumstances; but before you come to the question of damages you must be satisfied that there is a case for damages.

If upon the testimony you find that the whistle was sounded and that the bell was rung; that there was no negligence
193 on the part of the defendant, why of course that is the end of the case; and if you find that either of these was omitted and that nevertheless the plaintiff or her mother, without remonstrance from her, suffered or moved onto that track without stopping to look or listen, why that would be the end of the case. It is said, and said very truly, that the plaintiff would not be responsible for the negligence of her mother, who was driving. That is true; but in that event it was just as much her duty to look and listen as it was the duty of the mother, and just as much her duty to suggest that they should stop and look and listen as it was the duty of the mother to stop and look and listen, and her duty to protest if that was not done.

I have been asked to give you some charges, a portion of which I will give you.

With reference to the speed of the train, I do not think, gentlemen, that that of itself can be considered as tending to sustain the charge of negligence in the management of the train, as alleged in the petition. I think, as I said to you before, that they have the right to move the train rapidly. They are under the requirement, however, to give the proper signals. Of course, where the crossing

is very dangerous and the surroundings are such that the whistle is not likely to be heard the train ought to be slowed up.

The testimony is that the train did not stop after the accident, but proceeded directly on to Newark. With reference to that the engineer says that he did not see the horse or the wagon; did
194 not know anything about the accident until some time after they had passed. The fireman just at the moment of striking did see the horse and saw a piece of the shaft of the buggy fly past the window. He communicated it to the engineer. Well, gentlemen, if it were a question whether this injury were wantonly inflicted I think that testimony would be significant. If there were anything indicating that there was any intention or any wanton disregard of the safety of these people, the fact that they train was moved right on by without stopp..g it would be proper to be considered. There is no such testimony, and therefore what occurred after the accident could hardly be said to have any bearing upon the question of negligence before the accident.

"If the plaintiff immediately before the horse stepped on the track could have seen the approaching train in time to stop, had she looked, the presumption is that she did not look, or if she did look that she did not heed what she saw, and in either case she was negligent and cannot recover." That I give to you. It is in substance what I have already given you in charge.

"If the plaintiff could have heard the whistle sounded and did not hear it because she did not listen for it, or having heard it did not heed it, she was in either case guilty of contributory negligence and cannot recover." That is correct also.

With reference to the sounding of the whistle, gentlemen, I think it proper to call your attention to the consideration that this was a crossing which, according to the testimony of the mother, both the plaintiff and her mother were well acquainted with. It was on the road between their home and Newark, and they passed over
195 it frequently. Now, we all know that sounds to which we are accustomed we sometimes hear without being conscious thereof without taking note, and in weighing the testimony as to the sounding of the whistle and the ringing of the bell it is fair to take that into account; but on the other hand take also into account the testimony of the mother that they were looking and watching for the train, which would tend to cause them to notice the sounding of the whistle if it was sounded.

"The fact that this was a dangerous crossing increased the care required of the plaintiff in approaching and driving over it in proportion to the danger to be apprehended. If the crossing was extraordinarily dangerous it required extraordinary care and caution on the part of the plaintiff to ascertain if a train was approaching, and failing in this she cannot recover."

That is correct also, and you are to take it into account in connection with what I have already said with reference to the fact that they were aware that it was about the time when the train was to be expected, and that that imposed upon them still greater care and

caution; and then there is another instruction which I have already given you in substance, which I need not repeat.

These, gentlemen, are all the suggestions that it occurs to me to give to you. You may take the case, gentlemen.

[Endorsed:] Emma Griffith *v.* B. & O. R. R. Co. Copy of charge. June 10, 1890.

196 Thereupon came the defendant and filed its motion for a new trial in this case; which said motion is in the words following:

Now comes the defendant, The Baltimore and Ohio Railroad Co., and moves the court to set aside the verdict and grant a new trial in this case, for the reasons following:

First. The court erred in refusing to direct a verdict in favor of the defendant.

Second. The verdict is against the weight of testimony and is contrary to law.

Third. The jury disregarded the law as given them in the charge by the court.

Fourth. A member of the jury, to wit, one John Gates was guilty of misconduct during the trial of the cause by talking about the case to a reporter of a newspaper.

Newly discovered evidence. By this newly discovered evidence the defendant expects to prove that the plaintiff was subject to epileptic fits long before the accident complained of in this case; which evidence was not known to the defendant and could not have been discovered by reasonable diligence, and for this reason the defendant claims that the damages are excessive.

Which said motion the court overruled; to which ruling of the court the defendant, by its counsel, excepted, and presents to the court this its bill of exceptions which is allowed, signed, and sealed by the court and ordered to be made a part of the record in

197 this case.

December 17, A. D. 1890.

GEO. R. SAGE,

U. S. District Judge, Southern District of Ohio, Eastern Division, Sitting in and Holding the Circuit Court in the Above-entitled Cause, the Circuit Judge Being Absent from the District. [SEAL.]

(Here follow diagrams marked pp. 197*a* and 197*b*.)

198 And afterwards, to wit, on the 17th day of December, A. D. 1890, the following bill of exceptions *were* filed in the clerk's office of said court clothed in the words and figures following, to wit:

In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

EMMA GRIFFITH, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

Bill of Exceptions No. 2.

Be it remembered that on the hearing of the motion in this case for a new trial, at this December term, A. D. 1890, the said defendant, in support of said motion, contended that this suit was brought and sought to be maintained under sections 3336 and 3337 of the Rev. Stat. of Ohio; that the said statutes and the decisions of the supreme court of the State of Ohio constraing the same should be held to be the rules of law governing this case and under which the issues therein are to be determined; that under the said sections of the statutes of Ohio and the decisions of the supreme court of said State the plaintiff, in order to maintain this action, was required to prove—

1. That the defendant failed to ring the bell and sound the whistle at the time and place as averred in her petition.
2. That said failure was the proximate cause of the injury of which she complains.

199 3. That in making proof of said failure to sound the whistle and ring the bell, and that such failure was the proximate cause of the injury of which the plaintiff complains, it was one of the elements in her case which she was required to establish to show that her own negligence did not contribute to the injury of which she complains and that the burden of showing that fact was on her and not on the defendant.

But the court in passing upon the motion held and decided that this action was not founded upon said statutory provision, but, on the contrary, was an action upon the liability of the defendant at common law for damages resulting from its negligence and that the burden was on the defendant to establish, by a preponderance of evidence, that the negligence of the plaintiff contributed to the injury of which she complains in this case, and that she introduced sufficient testimony upon the case set forth in her petition to authorize its submission by the court to the jury, and the jury having found for the plaintiff, the court was not warranted in disturbing the verdict.

To all of which rulings, findings, opinion, and decision the defendant, by its counsel, excepted, and here presents to the court its bill of exceptions, taken on the hearing of said motion, which is allowed, signed, and sealed by the court and ordered to be made a part of the record in this case.

Dec. 17, A. D. 1890.

[SEAL.] GEORGE R. SAGE,
U. S. Dist. Judge, Sitting in and Holding said Court in the Absence of the Circuit Judge.

200 And afterwards, to wit, on the 12th day of January, A. D. 1891, the following supersedeas bond was filed in the clerk's office of said court clothed in the words and figures following, to wit:

Supersedeas Bond.

Circuit Court of the United States, Southern District of Ohio, Eastern Division, *ss:*

EMMA GRIFFITH
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

Know all men by these presents that we, The Baltimore and Ohio Railroad Company, as principal, and E. T. Affleck and William A. Herchiser are held and firmly bound unto Emma Griffith in the sum of ten thousand and five hundred dollars, to be paid to the said Emma Griffith, her executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators firmly by these presents.

Sealed with our seals. Dated this 12th day of January, 1891.

Whereas the above-named The Baltimore & Ohio Railroad Company has taken out an writ of error to the Supreme Court of the United States of America to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is such that if the above-named The Baltimore and Ohio Railroad Company
201 shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

E. T. AFFLECK. [SEAL.]
WM. A. HERSHISER. [SEAL.]

Sealed and delivered in presence of—

____ ____.

The above security is approved.

GEO. R. SAGE,
District Judge of the U. S., S. D. Ohio, Sitting in and Holding the Circuit Court in the Above-entitled Case.

202 *Clerk's Certificate.*

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Eastern Division, } *ss:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing is a full, true, and complete transcript of

the proceedings had by and before said court in the above-entitled cause in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Columbus, Ohio, this 15th day of January, A. D. 1891.

Seal of the Circuit Court, South'n Dist. of Ohio.

B. R. COWEN, *Clerk*,
By JANIE U. COWEN, *Deputy*.

O. K.
J. W. F., C.

203 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Emma Griffith and The Baltimore and Ohio Railroad, a manifest error hath happened to the great damage of the said company as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, chief justice of the said Supreme Court, the 12th day of January, 1891, in the year of our Lord one thousand eight hundred and ninety-one.

Seal of the Circuit Court, South'n Dist. of Ohio.

B. R. COWEN,
Clerk of the Circuit Court of the U. S., S. D. O.

[Endorsed:] United States circuit court, S. D. O., E. D. No. 603. Emma Griffith *vs.* The B. & O. R. R. Co. Writ of error.

204 THE UNITED STATES OF AMERICA, *ss:*

To Emma Griffith, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the

United States for the southern district of Ohio, wherein The Baltimore and Ohio Railroad Company, plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 12th day of January, in the year of our Lord one thousand eight hundred and ninety-one.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

GEO. R. SAGE,
Judge of the District Court of the United States within and for the Southern District of Ohio, Sitting and Holding Circuit Court, there Being no Circuit Judge or Associate Justice in the District.

205 UNITED STATES OF AMERICA, }
Southern District of Ohio, Eastern Division. }

Received this writ at Columbus, Ohio, on the 13th day of January, A. D. 1891, and on the 19th day of January, A. D. 1891, I executed the same by delivering to Mrs. Emma Renz, formerly Emma Griffith, a true copy of this writ with the endorsements thereon this 20th day January, A. D. 1891.

Fees.

1 service	$2 00
35 miles of wr. a. 6c	2 10
1 copy	50
	$4 60

J. H. SIMMONS,
U. S. Marshal, S. D. O.,
By WALTER HYSELL, *Deputy.*

[Endorsed:] United States circuit court, S. D. O., E. D. No. 603. Emma Griffith *vs.* The B. & O. R. R. Co. Citation to defendant in error. Filed January 12, 1891. B. R. Cowen, clerk.

206 *Stipulation Between Counsel.*

In the Supreme Court of the United States.

THE BALTIMORE & OHIO RAILROAD COMPANY, Plaintiff in Error, *vs.* EMMA GRIFFITH, Defendant in Error. } Whole No., 14863.

Whereas, by inadvertance, the affidavits submitted by the plaintiff in error on its motion for a new trial in the case of Emma Griffith *v.* The Baltimore & Ohio Railroad Company in the court below, being the circuit court of the United States for the southern dis-

trict of Ohio, eastern division, were inserted in the transcript of the record returned with the writ of error in this case, and the affidavits submitted by the defendant in error on the same motion were, by inadvertance, omitted from said transcript, it is hereby stipulated and agreed that said affidavits so inserted shall not be regarded or considered part of the record or printed in the printed record; that this stipulation shall be filed with the clerk of this court among the papers in this case.

SAM'L M. HUNTER,
Attorney of Def't in Error.
JOHN K. COWEN,
Attorney of Pl'ff in Error.

March 8, 1892.

207 [Endorsed:] Case No. 14863. Supreme court U. S., 1891, October term. No. 1389. The Balto. & Ohio Railroad Co. pl'ff in error, *vs.* Emma Griffith. Stipulation that certain affidavits be omitted from transcript of record and be not printed. Filed March 10, 1892.

Endorsed on cover: Case No. 14,863. S. Ohio. C. C. U. S. No. 304. The Baltimore & Ohio Railroad Company, plaintiff in error, *vs.* Emma Griffith. Filed September 28, 1891.

FILED.
OCT 22 1895
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895. No. 53.

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Plaintiff in Error,*

vs.

EMMA GRIFFITH.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

POINTS FOR PLAINTIFF IN ERROR ON THE QUESTION OF JURISDICTION.

JOHN K. COWEN,
HUGH L. BOND, JR.
For Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895. No. 53.

THE BALTIMORE AND OHIO RAILROAD COMPANY, *Plaintiff in Error,*

vs.

EMMA GRIFFITH.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

POINTS FOR PLAINTIFF IN ERROR ON THE QUESTION OF JURISDICTION.

1. The judgment below is "for the sum of five thousand one hundred and fifty-four and $\frac{17}{100}$ dollars," together with costs. (Record, page 16.) The amount of the judgment below determines the jurisdiction.

Thompson vs. Butler, 95 U. S. 694.

Alabama Gold Life Ins. Co. vs. Nichols, 109 U. S. 233.

N. Y. Elevated R. R. Co. vs. Fifth Nat. Bk., 118 U. S. 608.

Quebec Steamship Co. vs. Merchant, 133 U. S. 375, 379.

Massachusetts Benefit Assn. vs. Miles, 137 U. S. 689.

In Quebec Steamship Co. vs. Merchant, (133 U. S. 379,) this Court said:

"The plaintiff takes the point that as the verdict did not exceed $5,000 this Court has no jurisdiction, although the judgment was for the amount of the verdict, with interest and costs. The statute in regard to the jurisdiction of this Court, provides that the matter in dispute must exceed the sum or value of five thousand dollars, exclusive of costs. Act of February 16, 1875, Ch. 77, sec. 3, 18 Stat. 316.

"It is well settled that the test as to the jurisdiction of this Court, in a case like the present, is the amount of the judgment below, even though without the interest included in it, the amount, exclusive of costs, would not be over $5,000. N. Y. Elevated Railroad vs. Fifth Nat. Bank, 118 U. S. 608."

2. In the case at bar, the defendant in error, plaintiff below, takes the point that the Circuit Court erred in entering the judgment for a sum greater than $5,000, on two grounds; (1) because no interest should have been included in the judgment; and (2) because the plaintiff below asked the Circuit Court not to include any interest.

To this point, we reply:

(*a.*) As to both grounds, that if the Circuit Court erred, the error resulted in a judgment for the plaintiff below, larger than would otherwise have been entered. The error, therefore, did not harm the plaintiff below, and could not support a writ of error in this Court, even had one been sued out.

(*b.*) In further reply to the first ground we say that the action of the Court below in including interest in the judgment was in accordance with the practice of the Federal Courts in Ohio, and was right.

That this action was in accordance with the practice of the Federal Courts in Ohio.—See

Owens vs. Baltimore & Ohio Railroad Company, 35 Fed. Rep. 715.

Gibson vs. Enquirer, 5 Central Law Journal, 446.

Judge Sage's statement at pages 15 and 16 of the Record.

The practice is necessary and proper under section 914 of the revised statutes to make the practice of the Federal Courts in Ohio "conform as near as may be" to the practice of the State courts, and in order to give to suitors in the Federal courts the same beneficial relief to which they are entitled in the State courts.

The rule in the Ohio courts is stated in the case of Kimball vs. Connelly (1 Western Law Monthly 402) as follows:

"Where the action is pending at the commencement of the term at which the judgment is entered, it takes effect from the first day of the term, and interest should be calculated on the debt up to that day; and from that date will the judgment draw interest."

The learned counsel for the defendant in error, in his brief, page 7, says:

"The fact is, the rule laid down in 1 Western Law Monthly, 402, is the rule of practice in Ohio, and I believe without an exception. Interest is allowed if proper up to the first day of the term. The judgment takes effect as of that date, and then interest on the judgment from that time. It is a good, safe, practical rule. * * * Interest on a verdict is never heard of in Ohio. Applying the rule to the case at bar; the term commenced on the first Tuesday of June, 1890. Trial commenced on June 6, verdict rendered June 10. At the latter part of the term in December, motion for a new trial was overruled and judgment on the verdict. *Now, according to the Ohio rule, the judgment should have been for $5,000, relating back and*

taking effect on June 3, the first day of the term, and draw interest from that time."

In attempting to conform to the Ohio practice, the Federal Courts meet the provisions of section 966 of the U. S. Revised Statutes, which provides that the interest "on all judgments in civil causes," "*shall be calculated from the date of the judgment*, at such rate as is allowed by law on judgments recovered in the Courts of such State."

Under the Ohio rule, the plaintiff gets interest on the amount of his verdict from the first day of the term. Under section 966, the plaintiff's judgment bears interest only from the date of its entry.

How can the Federal Court give the plaintiff interest on the amount of his verdict from the first day of the term, except by calculating such interest to the date of the judgment and including it in the judgment?

To call the increment "interest on the judgment," or to call it "interest on the verdict," gives it no characteristic description. In either case, it is interest at the same rate, for the same time, on the same sum of money.

In Massachusetts Benefit Association vs. Miles, (137 U. S. 689), this Court said (page 691):

"Section 966, while providing only for interest upon judgments, does not exclude the idea of a power in the several States to allow interest upon verdicts, and where such allowance is expressly made by a State statute, we consider it a right given to a successful plaintiff, of which he ought not to be deprived by a removal of his case to the Federal Court."

The practice of the Federal Courts in Ohio, brought in question here, gives to the successful plaintiff only the same right which is given him by the statutes of Ohio, as construed by the Courts of that State.

(c.) The second ground of the defendant in error is that the Court below should have allowed her to take judgment for the amount of the verdict without interest,

for the purpose of preventing a writ of error. The Court below decided, after argument, that the plaintiff was entitled to a judgment for $5,154.17, and refused to permit the plaintiff to remit all over $5,000.

In Thompson vs. Butler (95 U. S. 694), this Court, speaking through Chief Justice Waite, said:

"Our jurisdiction cannot be invoked until the final judgment below has been rendered; and we cannot open the record to look for errors until jurisdiction has been established. The Court below retains full control of a cause until final judgment has been entered; and it follows that, if for any reason a judgment is given against a defendant in a case involving the plaintiff's cause of action alone, unaffected by counter claim or set off, for a sum less than our jurisdictional amount, we have no power, at the instance of the defendant to correct errors that may have been committed in settling the amount. We can only look at a verdict through the record; and, if the record is closed to us, so necessarily must be the verdict. In this case, therefore, we are precluded from inquiry into the propriety of allowing the verdict to be reduced before judgment was entered upon it."

* * * * * * *

"*Undoubtedly, the trial Court may refuse to permit a verdict to be reduced by a plaintiff upon his own motion; and if the object of the reduction is to deprive an appellate Court of jurisdiction in a meritorious case, it is to be presumed the trial Court will not allow it to be done.* If, however, the reduction is permitted, the errors in the record will be shut out from our re-examination in cases where our jurisdiction depends upon the amount in controversy."

In the case at bar the Court below exercised the discretion, the exercise of which this Court said, in the passage we have italicized, was the undoubted right of the trial Court.

We submit, that the discretion of the trial Court was in no way limited by the fact that the sum which the plaintiff wished to remit, only equalled in amount the interest to which she was entitled. Indeed the considerations so clearly stated by Chief Justice Waite, demonstrates that the discretion of the trial Court cannot be questioned on a motion to dismiss for lack of jurisdiction in this Court.

Until jurisdiction attaches, all this Court can look at is the judgment. "We can only look at a verdict through the record; and if the record is closed to us, so necessarily must be the verdict." How then can this Court look at the verdict to see whether the judgment agrees with it, unless and until this Court takes jurisdiction? Such an examination of the record is an examination for error, and can be made only on the assumption of jurisdiction.

As error, the refusal of the Court below to permit a reduction in the account of the judgment did not harm the plaintiff, and cannot constitute a ground for reversal at her instance. The Court's refusal having been based on the objection of the defendant, cannot constitute a ground for reversal at the instance of the defendant. It follows that the action of the Court below in fixing the amount of the judgment cannot be assigned as error by either party, and is not the subject of review by this Court.

JOHN K. COWEN,
HUGH L. BOND, JR.
For Plaintiff in Error.